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Status: GRANTED

Title: Eastern Air Lines, Inc., Petitioner
v.
Robert F. Mahfoud, etc.

Docketed:
May 4, 1984

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Weller, Francis G., Sharp, Richard M

Counsel for respondent: Farrell, George E.

Entry	Date	Note	Proceedings and Orders
1	May 4 1984	G	Petition for writ of certiorari filed.
2	Jun 6 1984		Brief of respondent Robert F. Mahfouc, etc. in opposition filed.
3	Jun 13 1984		DISTRIBUTED. September 24, 1984
4	Oct 1 1984		Petition GRANTED.
			**********
5	Nov 6 1984		Record filed.
6	Nov 15 1984		Brief of petitioner Eastern Air Lines, Inc. filed.
7	Nov 15 1984		Joint appendix filed.
8	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 15, 1985. (2nd case
9	Dec 10 1984		CIRCULATED.
10	Dec 14 1984	X	Brief amicus curiae of Dina Avecilla, et al. filed.
11	Dec 17 1984	X	Brief of respondent Robert F. Mahfoud, etc. filed.
12	Jan 7 1985	X	Reply brief of petitioner Eastern Air Lines, Inc. filed.
13	Jan 15 1985		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

Office - Supreme Court, U.S.
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MAY 4 1984
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CLERK

88-1807

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,

PETITIONER

VERSUS

ROBERT F. MAHFOUD, ETC.,

RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57pp

QUESTIONS PRESENTED

MAY A COURT, BY ADDING INTEREST TO A JUDGMENT, MAKE AN AWARD THAT EXCEEDS THE MAXIMUM LIABILITY LIMITATION IMPOSED BY AN INTERNATIONAL TREATY, THE WARSAW CONVENTION, AS SUPPLEMENTED BY THE MONTREAL AGREEMENT?

The United States Court of Appeals, Fifth Circuit, has answered "Yes" to this question.

The United States Court of Appeals, Second Circuit, has answered "No".

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 21.1(b) and 28.1, counsel for Petitioner certifies that the parties to this proceeding are: Robert F. Mahfoud, Paul B. Mahfoud, Mireille Ma Belle Mahfoud, Natalie La Rose Mahfoud and Eastern Air Lines, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,

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ROBERT F. MAHFOUD, ETC.,

RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Eastern Air Lines, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 8, 1984.

OPINION BELOW

The opinion of the Fifth Circuit appears in the attached appendix.

JURISDICTION

The Fifth Circuit entered judgment in this matter on March 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (*reprinted in* 49 U.S.C. §1502, T.S. No. 876, 137 L.N.T.S. 11), and more particularly, Article 22 thereof. (Hereinafter referred to as the Warsaw Convention.)

"ARTICLE 22"

> "(1) In the transportation of passengers the liability of the carrier for each passenger *shall be limited* to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of said payments *shall not exceed* 125,000 Francs. . . ." (Emphasis added)

49 U.S.C. §1502 (Warsaw Convention)

2. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by Order No. E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966) [Montreal Agreement].

> "[A] *limit of liability* for each passenger for death, wounding or other bodily injury of $75,000...." (Emphasis added)

31 Fed. Reg. 7302 (1966) (Montreal Agreement).

STATEMENT OF THE CASE

The instant case arises out of the crash of Eastern Air Lines Flight 66, on June 24, 1975, at Kennedy International Airport. The action was brought on behalf of the minor children of Bernard and Odile Mahfoud, who were killed in the crash. The Mahfouds were engaged in international travel, and were subject to the provisions of the Warsaw Convention, as supplemented by the Montreal Agreement.

Robert F. Mahfoud filed suit on behalf of the children in the United States District Court, Western District of Louisiana, on December 5, 1975, and against Eastern Air Lines, The United States of America, and others. The case was transferred to the Eastern District of New York by order of the Multi-District Litigation Panel, where it was consolidated by Judge Bramwell for trial on the issue of liability.

On the day the liability issue was to go to trial, Mahfoud moved orally to sever his claim against Eastern, and moved for entry of judgment against Eastern, based on the Warsaw Convention as supplemented by the Montreal Agreement.

Judge Bramwell granted plaintiff's motion despite Eastern's opposition on the ground of procedural deficiencies.

The United States Court of Appeals, Second Circuit reversed, with instructions to Mahfoud that he reassert his Warsaw/Montreal motion after remedying the procedural deficiencies. Mahfoud did not reurge his motion.

While this suit was still pending in the Eastern District of New York, Eastern moved for a pre-trial summary judgment, to have its liability limited pursuant to Warsaw/Montreal. Without ruling on the motion, Judge Bramwell transferred the case back to Louisiana for a trial

on damages. Plaintiff, who had heretofore insisted on the applicability of Warsaw/Montreal, now opposed it, on various grounds.

On November 16, 1982, United States District Judge Nauman S. Scott ruled that the terms and conditions of Warsaw/Montreal were applicable, and that interest should be imposed.

On December 2, 1982, Eastern deposited in the registry of the court $150,000.00, representing $75,000.00 per passenger seat, the maximum amount for which Eastern believed it could be liable under Warsaw/Montreal, and asked for reconsideration of the interest question.

The district court denied the motion for reconsideration and, on April 2, 1983, entered judgment, *inter alia*, limiting Eastern's liability to $150,000.00, plus prejudgment interest from the date suit was filed, until December 2, 1982. (Appendix A.)

The United States Court of Appeals, Fifth Circuit, citing its own decision in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (CA 5-1984), affirmed the discretionary authority of the district court to award interest on a Warsaw/Montreal judgment, even though the imposition of interest might increase an award to more than $75,000.00 per passenger seat. (Appendix B.)

Meanwhile, on March 2, 1984, the United States Court

of Appeals for the Second Circuit, ruled that, as a matter of law, the liability limitation was designed to be and is absolute, and that prejudgment interest may not be awarded if the effect is to exceed the stated liability limitation. *O'Rourke, etc. vs. Eastern Air Lines, Inc.*, No. 56,182 (CA 2-Mar. 2, 1984). (Appendix C.)

REASONS FOR GRANTING THE WRIT

A conflict between a decision by the United States Court of Appeals, Fifth Circuit, and a decision by the United States Court of Appeals, Second Circuit, compels issuance of a writ to resolve the question of whether a court may, by awarding interest on a Warsaw/Montreal Judgment, exceed the liability limitation imposed by the Warsaw Convention and Montreal Agreement.

The decision of the Fifth Circuit Court in *Mahfoud v. Eastern Air Lines, Inc.*, 83-4315 (CA 5-1984), directly conflicts with the decision of the Second Circuit Court in *O'Rourke, etc. v. Eastern Air Lines, Inc.*, No. 56, 182 (CA 2-Mar. 2, 1984).

Each circuit considered the question of whether prejudgment interest could properly be awarded against Eastern Air Lines, consistent with Article 22 of the Warsaw Convention, when the result would be a judgment exceeding the $75,000 per seat limitation of liability.

The Fifth Circuit ruled that the limited liability amount of $75,000 per seat, as provided by Article 22 of the Warsaw Convention, and as supplemented by the Montreal Agreement, does not preclude the award of prejudgment interest over and above that amount, if certain equitable considerations are met.

In awarding interest in this case, the Fifth Circuit held that it is within the discretion of the district court to award prejudgment and postjudgment interest, as it held in its earlier decision in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (CA 5-1984).[1] In *Domangue*, the Court remanded the interest issue for a factual determination of who was "at fault" for the delay in bringing that case to trial. The Court held that if Eastern was at fault, then, as a matter of equity, interest could be awarded.

The Second Circuit in its *O'Rourke* opinion expressly disagreed with the Fifth Circuit, stating:

> "Moreover, we do not agree with the fifth circuit's interpretation of the Montreal Agreement. The speedy resolution of claims was apparently not an important United States objective at the conference. *See* Lowenfeld & Mendelsohn, *supra* note 15, at 572. The principal purpose of the United States at the Montreal Conference was to increase the liability limit to $100,000. The absolute liability provision was introduced as a means of getting the United States to accept a liability limit lower than $100,000, *see id.* at 563, 570-71, and was not one of the prime objectives of the American delegation. *See id.* at 572 ("The United States delegation was itself divided on [this] issue, and its instructions were not firm on the point."). Thus, the payment of prejudgment interest would not advance any of the underlying objectives of the Convention or the Agreement, but it would undercut, as we discussed above, two of the Convention's major objectives."

O'Rourke opinion at p. XI.

[1] This case also arose out of the crash of Flight 66.

Further, the Second Circuit noted that the Warsaw Convention is a treaty adhered to by the United States, and that—

> "[I]n the absence of any contrary intent on the part of the framers, we [the court] may not read into the document a provision that allows the payment of prejudgment interest above the $75,000 liability limitation." (Footnote omitted)

O'Rourke opinion at p. 21.

The issue before the Court concerns an important federal question, with international ramifications. Its resolution will determine whether one of the fundamental concepts of the Warsaw Convention will survive.

> "Secretary of State Cordell Hull, in transmitting the Warsaw Convention to the Senate in 1934 indicated that the purpose of the liability limitation was 'to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover their damages.' *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977)".

Domangue v. Eastern Air Lines, Inc., 542 F.Supp. 643, 653 (E.D. La. 1982)

The decision by the Fifth Circuit allowing interest over and above the $75,000.00 maximum limit of damages recoverable under the Warsaw Convention/Montreal Agreement is contrary to the drafters' intent. Neither this Court nor any area federal appellate court has ever awarded interest over and above the maximum liability limitation before the Fifth Circuit did so in *Domangue*, above.

As this Court recently said in *Trans World Airlines v. Franklin Mint Corp.*, __ U.S. __, 52 L.W. 4445 (April 17, 1984).

> "We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence....
>
> ****
>
> "The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored." (Citations omitted)

Trans World, __ U.S. __, 52 L.W. 4445, 4449.

If upheld, the decision of the Fifth Circuit will defeat the Warsaw Convention's specific purpose.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition of certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES COURT
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 75-1291

ROBERT F. MAHFOUD, ETC.,

versus

EASTERN AIR LINES, INC. and
UNITED STATES OF AMERICA

JUDGMENT

This is an action for damages brought pursuant to 28 U.S.C. §§ 1332, 1346(b), 2671 *et seq.* against Eastern Air Lines, Inc. and the United States of America by Robert F. Mahfoud on behalf of Paul, Mireille and Natalie Mahfoud, the three minor children of Bernard and Odile Mahfoud, deceased.

In a prior proceeding this Court granted a summary judgment finding that defendant, Eastern Air Lines, Inc., is liable, based upon the Warsaw Convention, as amended by the Montreal Agreement, up to the maximum principal amount of $75,000 for each death.

On December 6, 1982 the Court called the case for trial on damages and the trial proceeded with plaintiff and defendant United States presenting evidence to the Court; the Court considered the pleadings of the party and the testimony and evidence properly admissible; from the admissible evidence and the reasonable and probable inferences to be drawn therefrom, and from the appropriate

statutes and the law, the Court issued its Ruling on April 5, 1983, said Rule to be and is hereby made a part of this Judgment as Findings of Fact and Conclusions of Law as provided by Rule 52, Federal Rules of Civil Procedure. It is therefore

ORDERED, ADJUDGED AND DECREED that the plaintiff be granted and is hereby given a Judgment for damages, resulting from the wrongful deaths of Bernard F. Mahfoud and Odile W. Mahfoud against Eastern Air Lines, Inc. and the United States of America, both being jointly, severally and in solido liable for the judgment, subject, however, to the liability of Eastern Air Lines, Inc. being limited to $150,000 per the Court's Ruling dated November 11, 1982, and the Mahfoud children are awarded and shall recover money damages in the following amounts:

PAUL BERNARD MAHFOUD, individually, the sum of Five Hundred Fifty One Thousand Six Hundred Sixty Six Dollars ($551,666.00);

MIREILLE MABELLE MAHFOUD, individually, the sum of Five Hundred Eighty Seven Thousand Six Hundred Sixty Six Dollars ($587,666.00);

NATALIE LAROSE MAHFOUD, individually, the sum of Six Hundred Five Thousand Six Hundred Sixty Eight Dollars ($605,668.00).

It is further

ORDERED, ADJUDGED AND DECREED that Eastern Air Lines, Inc. shall pay interest on the above sum and amount as follows: prejudgment interest from December 4, 1975, the date of judicial demand, to

September 12, 1980 at the rate of 7%, from September 12, 1980 to September 11, 1981 at the rate of 10%, and from September 11, 1981 to December 2, 1982, the date of deposit in the Registry of the Court, at the rate of 12%. The United States of America is to bear postjudgment interest from date of entry of this Judgment as provided by 28 U.S.C. § 1961. It is further

ORDERED, ADJUDGED AND DECREED that intervenor, United States Fidelity & Guaranty Insurance Company, is entitled to Twenty Nine Thousand One Hundred Thirty Dollars ($29,130.00) pursuant to a stipulation between parties as reimbursement for workmen's compensation paid; said reimbursement to be owed by the United States of America and Eastern Air Lines, Inc., jointly, severally, and insolido. It is further

ORDERED, ADJUDGED AND DECREED that the defendants, United States of America and Eastern Air Lines, Inc., be given credit, in equal amounts from the above adjudged recovery of each of the Mahfoud children, for the amount paid to United States Fidelity & Guaranty Insurance Company. It is further

ORDERED, ADJUDGED AND DECREED that the sum awarded to United States Fidelity & Guaranty Insurance Company bear interest from date of judgment at the rate provided by 28 U.S.C. § 1961. It is further

ORDERED, ADJUDGED AND DECREED that plaintiff be awarded against the United States of America, in addition to the sums and amounts previously itemized, court costs as assessed by the Clerk of Court.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this the 21st day of April, 1983.

/s/ NAUMAN S. SCOTT
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83-4315

D.C. Docket NO. CA-75-1292-A

ROBERT F. MAHFOUD, ETC.,

Plaintiff-Appellee Cross-Appellant,

versus

EASTERN AIR LINES, INC., ET AL.,

Defendants-Third Party Plaintiffs

EASTERN AIR LINES, INC.,

Defendant-Third Party Plaintiff-Appellant-Appellee.

Appeals from the United States District Court for the Western District of Louisiana

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby affirmed;

IT IS FURTHER ORDERED that defendant-third party plaintiff-appellant-appellee pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 8, 1984

ISSUED AS MANDATE:

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

As stated by the appellant, Eastern Air Lines, in its brief, the only issue in this case is:

> Whether interest, prejudgment or postjudgment, over and above the $75,000 maximum limit of damages, is recoverable on a Warsaw Convention/ Montreal Agreement judgment.

This issue was settled by this Court in *Domangue v. Eastern Air Lines*, 722 F.2d 256 (5th Cir. 1984). In that case we held that the trial court could award both prejudgment and postjudgment interest in a wrongful death action under the Warsaw Convention and the Montreal Agreement, such interest to be in addition to the $75,000 limited liability of the Convention and Agreement. The award of prejudgment and postjudgment interest by the district court, therefore, was within its authority. The judgment

of the district court awarding $75,000 plus prejudgment and postjudgment interest is

AFFIRMED.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 56,182—August Term, 1983

(Argued September 7, 1983 Decided March 2, 1984)

Docket Nos. 83-6065, 83-6071

TIERNEY A. O'ROURKE, PUBLIC ADMINISTRATOR OF QUEENS COUNTY, NEW YORK, as Administrator of the Estate of Alexandros Hadzis, deceased,

Plaintiff-Appellee-Cross-Appellant,

-against-

EASTERN AIR LINES, INC.,

Defendant-Cross-Appellee,

-and-

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee.

Before MANSFIELD and PRATT, *Circuit Judges*, and TENNEY, *Senior District Judge*.*

Appeal and cross-appeal from a final judgment of the Eastern District of New York (Bramwell, J.) entered after a non-jury trial awarding the estate of Alexandros Hadzis

* Of the Southern District of New York, sitting by designation.

$982,100 for his wrongful death. Affirmed in part; reversed in part.

MILTON G. SINCOFF, ESQ., New York, N.Y. (Steven R. Pounian, Esq., Kreindler & Kreindler, N.Y., N.Y., Chauncey E. Wilowski, Jamaica, N.Y., on the brief), *for Plaintiff-Appellee-Cross-Appellant.*

ALAN D. REITZFELD, ESQ., New York, N.Y. (Walter E. Rutherford, Esq., Haight, Gardner, Poor & Havens, N.Y., N.Y., on the brief), *for Defendant-Cross-Appellee.*

THOMAS B. ROBERTS, Assistant United States Attorney (Raymond J. Dearie, United States Attorney, Eastern District of New York, Miles M. Tepper and Cyril Hyman, Assistant United States Attorneys, on the brief), *for Defendant-Appellant-Cross-Appellee.*

TENNEY, D.J.

Defendant, United States of America ("the United States"), appeals from a final judgment of the United States District Court for the Eastern District of New York, Henry Bramwell, *District Judge*, awarding plaintiff $982,100 in damages for the wrongful death of plaintiff's decedent. The United States contends that the award was excessive as a matter of law and, in addition, that the district court erred when it permitted the plaintiff to increase the *ad damnum* clause in the amended complaint to an amount in excess of the administrative claim filed pursuant to 28 U.S.C. § 2675 (1976).

On cross-appeal, plaintiff, Tierney A. O'Rourke, the

Public Administrator of Queens County, New York ("the Public Administrator") challenges (1) the application of New York law instead of Greek law to the question of damages, (2) the court's refusal to award prejudgment interest on a sum due from Eastern Air Lines, Inc. ("Eastern") under the absolute liability provision of the Warsaw Convention, (3) the exclusion of circumstantial evidence on the decedent's conscious pain and suffering, and (4) the exclusion of certain testimony on the issue of lost future earnings.

For the reasons stated below, we affirm the rulings contested by plaintiff on cross-appeal, but reverse on the issues raised by the government concerning the award of damages. The district court erred in allowing the plaintiff to amend the *ad damnum* clause. Furthermore, the award of damages is excessive and, accordingly, the district court is instructed to retry the issue of damages unless the plaintiff is willing to remit 21% of the award.

BACKGROUND

On June 24, 1975 Eastern Air Lines Flight 66 en route from New Orleans to New York City crashed on its approach to John F. Kennedy International Airport ("JFK"). Among those killed in the crash ws Alexandros Hadzis ("Hadzis"), a Greek citizen and seaman who was on his way home to Greece. The Public Administrator brought an action against Eastern and the United States on behalf of Hadzis' estate initially seeking $925,000 in damages for his wrongful death and conscious pain and suffering. The claim against the United States, brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80

(1976),[1] alleged that the air traffic controllers at JFK had been negligent. In addition, because Hadzis was engaged in international transportation at the time of the crash[2] and, thus, subject to the terms and conditions of the Warsaw Convention ("the Convention"),[3] as supplemented by the Montreal Agreement ("the Agreement"),[4] plaintiff brought a separate claim for $75,000 against Eastern under the absolute liability provision of the Convention. All of the actions arising out of the crash were transferred to the Eastern District of New York and were consolidated for pretrial purposes. *See In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 407 F.Supp. 244 (J.P.M.D.L. 1976). After the completion of pretrial discovery the court consolidated the passenger actions for a trial on the issue of liability. On the eve of trial, the United States consented to a liability judgment. Subsequently, a jury found Eastern negligent. This was affirmed on appeal. 635 F.2d 67 (2d Cir. 1980). Following the affirmance, Eastern moved pursuant to the damage limitation provision of the Warsaw Convention for pretrail summay judgment to limit its liability to the Hadzis estate to $75,000. The court granted the motion, *O'Rourke v. Eastern Air Lines*, 16 Avi. L. Rep. 18,367 (E.D.N.Y. Jan.

---

[1] The law of New York governs the substantive issues in this case. 28 U.S.C. § 1346(b) (1976); *see infra* discussion.

[2] Hadzis' plane ticket provided for him to transfer from Eastern Flight 66 to TWA Flight 880, which flew from JFK to Greece.

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 (*reprinted in* 49 U.S.C. § 1502, T.S. No. 876, 137 L.N.T.S. 11).

[4] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966).

29, 1982), and on March 1, 1982, after depositing $75,000 with the Clerk of the Court, Eastern withdrew from the proceedings.

Plaintiff had previously made two motions. One sought a ruling that the damage law of Greece applied to the action on behalf of the Hadzis estate. The other sought permission to amend the complaint in that action to increase the *ad damnum* clause from $925,000 to $1,400,000. The district court ruled that New York law rather than Greek law applied and, with the other motion still pending, commenced a non-jury trial on the issue of damages.

On June 21, 1982, the lower court entered two orders. In one, the court granted plaintiff's motion to increase the *ad damnum* clause. In the other, which included the court's findings of fact and conclusions of law, the court awarded the plaintiff $982,100 for the wrongful death of Hadzis. The court made no award for his conscious pain and suffering apparently because no evidence had been admitted at the trial to substantiate this claim. Durirg the course of the trial, the court ruled that the proffered testimony of Mary Mooney ("Mooney"), an Eastern flight attendant who survived the crash, was not relevant on the question of Hadzis' pain and suffering and was therefore inadmissible.

The district court also found that the $982,100 award did not have to be discounted. While it recognized the usual requirement that awards be discounted to present value, *see generally Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541, 2550 (1983) ("[E]ven in an inflation-free economy the award of damages to replace the lost stream of income cannot be computed simply by totaling up the sum of the periodic payments. For the damages

award is paid in a lump sum at the conclusion of the litigation, and when it—or even a part of it—is invested, it will earn additional money....'[T]he ascertained future benefits ought to be discounted in the making up of the award.' ") (quoting *Chesapeake & Ohio R. Co. v. Kelley*, 241 U.S. 485, 490 (1916)) (footnote omitted), the lower court found, based on the testimony of plaintiff's expert, that the "total offset" approach should be applied. Under this approach an award for lost future earnings is adjusted neither upward nor downward since the potential benefit from investing the money is counterbalanced by inflationary forces. *See Pfeifer, supra*, 103 S.Ct. at 2554. In a related evidentiary ruling the court held that the plaintiff's expert could not testify about the propriety of adjusting the lost future earnings figure upward because his proposed testimony came as a surprise to the government.

Finally, in a post-trial motion, the plaintiff moved for an order directing Eastern to pay prejudgment interest on the $75,000. Finding that the damage limitation provisions of the Convention and Agreement were inclusive of prejudgement interest, the lower court denied the motion. *O'Rourke v. Eastern Air Lines, Inc.*, 553 F.Supp. 226 (E.D.N.Y. 1982).

Since we do not agree with the plaintiff-cross-appellant that the district court erred in its rulings on the prejudgment interest, the admissibility of testimony, or the choice-of-law question, we affirm on those issues. We do believe, however, that the court erred in allowing the plaintiff to amend the *ad damnum* clause and that the final damage award is excessive. Thus, a retrial of the damage issue is required unless the plaintiff agrees to a remittitur as set out below.

Because a determination of the appropriate substantive law to be applied in this case is necessary before we may consider in particular the prejudgment interest issue, and the award of damages, we will address the questions raised on cross-appeal first.

DISCUSSION

A. *The Cross-Appeal*

1. *Choice-of-law*

The Public Administrator argues that Judge Bramwell erred in applying New York's wrongful death law. Although New York's choice-of-law rules are far from clear, we do not believe that a New York court would agree with the plaintiff and apply the law of Greece in this case where the tortious conduct occurred in the state and New York is the forum state.

Under the FTCA a district court must apply the whole law of the state in which the acts of negligence occurred, including the choice-of-law rules of that state. *Richards v. United States*, 369 U.S. 1 (1962). Where jurisdiction rests upon diversity of citizenship, the court must apply the whole law of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).[5]

Following these guidelines, the district court held that under New York's choice-of-law rules a New York

[5] The court's jurisdiction in this case rested on 28 U.S.C. § 1346(b) for the FTCA claim against the government and 28 U.S.C. § 1332 (diversity of citizenship) for the claim against Eastern.

court would apply its own substantive law concerning wrongful death because it was either the place of the wrong or the place with the greater governmental interest. New York's Wrongful Death Statute, unlike that of Greece, does not provide for recovery in wrongful death actions for loss of consortium, *Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (1980), or for the survivor's grief. *Horton v. State*, 50 Misc. 2d 1017, 272 N.Y.S.2d 312 (Ct. Cl. 1966). *See also Garland v. Herrin*, No. 83-7100, slip op. at 7419 (2d Cir. Dec. 8, 1983).

Our task is to determine what law New York courts would apply in this situation rather than a "rule we [might] think better or wiser." *See id.*, slip op. at 7413 (quoting *Hausman v. Buckley*, 299 F.2d 696, 704-05 (2d Cir.), *cert. denied*, 369 U.S. 885 (1962)); *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 205 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978). Furthermore, we have noted that "the district judge's interpretation of...choice-of-law precedent is entitled to special deference because of his experience and familiarity with [the] law." *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676 (2d Cir. 1983) (citing *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204 (1956)). This principle is especially persuasive when this court is called upon to wade into New York's choice-of-law quagmire.

The New York Court of Appeals was one of the first courts to reject the rigid *lex loci delicti* (place of the wrong) rule in favor of a more flexible modern approach to tort choice-of-law questions.[6] In the landmark case of *Babcock*

[6] For a comprehensive discussion of New York's choice-of-law rules and precedents see Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum. L. Rev. 772 (1983).

v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the court held that an Ontario guest statute would not be applied to bar recovery in an action by a New York guest against a New York automobile driver-host, even though the accident occurred in Ontario. The court stated that:

> Justice, fairness and "the best practical result"...may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation.

12 N.Y.2d at 482, 191 N.E.2d at 283, 240 N.Y.S.2d at 749 (citation omitted).

However, over the next nine years, as a number of conflict-of-law cases involving wrongful death and guest statutes reached the court, the analytical methodology on which the court relied in selecting the appropriate law appeared to change. *See, e.g., Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (applicable law determined by the location of most significant relationship between the parties); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966) (applicable law determined by a counting of the contacts with the interested states); *Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (government interest analysis determines choice-of-law question). See generally* R. Leflar, *American Conflicts Law* § 91, at 183-85 (3d ed. 1977); Korn, *supra* note 6, at 820-902. Thus, the court created an inconsistent body of precedent with seemingly similar cases decided differently.

Finally, in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the court acknowledged this lack of consistency in its previous multistate accident cases. *Id.* at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69. In *Neumeier*, the question before the court again concerned Ontario's guest statute. The issue was whether the statute was applicable in an action between an injured Ontario domiciliary and his New York host arising out of an accident in Ontario. The court held that the statute did apply and promulgated three principles for the resolution of future guest statute problems in conflict situations.[7]

[7] The following three principles were proposed by the *Neumeier* court:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
>
> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
>
> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70 (citations omitted).

However, the court did not make clear whether these principles applied equally to other multistate tort cases. *See* Herzog, *1982 Survey of New York Law—Conflicts-of-Laws*, 34 Syracuse L. Rev. 113, 140 (1983); Korn, *supra* note 6, at 884-86.

After *neumeier*, the flow of explicative decisions dealing with tort choice-of-law issues dwindled, and only a few short opinions have been issued by the Court of Appeals. *See, e.g., Croft v. National Car Rental*, 56 N.Y.2d 989, 439 N.E.2d 346, 453 N.Y.S.2d 631 (1982) (mem.); *Cousins v. Instrument Flyers, Inc.*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978) (per curiam). Unfortunately, these have only added to the confusion. *See generally* R. Cramton, D. Currie & H. Kay, *Conflict of Laws* 243 (3d ed. 1981); Korn, *supra* note 6, at 957.

In *Cousins*, the court signaled an apparent retreat from its modern approach. It stated in dictum that "[i]t is true that *lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances. But it has been acknowledged that in airplane crash cases, the place of the wrong, if it can even be ascertained, is most often fortuitous." 44 N.Y.2d at 699, 376 N.E.2d at 915, 405 N.Y.S.2d at 442 (citations omitted).[8] This statement has

[8] *Cousins* was a strict products liability action arising out of a crash in Pennsylvania of a plane rented from a New Jersey corporation by a New York resident. The president of the corporation resided in New York, and the plane had been manufactured in Florida by a Pennsylvania corporation. The parties proceeded to trial on the assumption that New York law applied. Only belatedly did the plaintiff suggest that Pennsylvania law should apply. Under then-applicable New York law, contributory negligence barred recovery; under either New Jersey or Pennsylvania law it did not. The court held that it was not error for the trial judge "to apply New York law, [because it was] not only the law of the forum, but [also] the law applicable to significant events in this multi-State trip by air in the absence of compelling reason to apply

caused considerable confusion in the lower New York courts.[9] *See* Korn, *supra*, at 957. Nevertheless, the Court of Appeals has made no attempt to clarify the "extraordinary circumstances" qualification, nor is it clear from the *Cousins* opinion that all or even most airplane crash cases are within this exception.

Notwithstanding these uncertainties, a district court judge faced with a New York choice-of-law question can not throw up his or her hands and walk away from the problem. With the above discussion in mind, we have concluded that Judge Bramwell did not commit reversible error in ruling that a New York court would apply its own substantive law in this case.

We are not convinced that, as the Public Administrator argues, the *lex loci delicti* rule in New York applies only to choice-of-law issues involving tortious conduct and not to the issue of damages. The Court of Appeals in *Cousins*, albeit in dictum, stated that "*lex loci delicti*

(Footnote 8 continued)
belatedly another law, whether on the doctrine of *lex loci delicti* or otherwise." 44 N.Y.2d at 700, 376 N.E.2d at 914, 405 N.Y.S.2d at 443 (emphasis added).

[9] The lower state courts have had difficulty with the "extraordinary circumstances" qualifer and uncertainty exists over whether *lex loci delicti* or "interest analysis" applies. *See, e.g., Grancaris v. J.I. Hass Co.*, 79 A.D.2d 551, 553, 434 N.Y.S.2d 19, 21 (1st Dep't 1980) (the rule of *lex loci delicti* applies except in rare instances); *Rakaric v. Croatian Cultural Club*, 76 A.D.2d 619, 627, 430 N..Y.S.2d 829, 835 (2d Dep't 1980) ("extraordinary circumstances" exist where New York has a strong interest in assuring that a resident would not be barred recovery by the doctrine of charitable immunity applicable in the place of the wrong); *Himes v. Stalker*, 99 Misc. 2d 610, 619, 416 N.Y.S.2d 986, 992 (Sup. Ct. 1979) ("What the Court of Appeals will determine to be 'extraordinary circumstances' is not clear."); *id.* at 622, 416 N.Y.S.2d at 993 (" '[L]ex loci delicti' should apply generally to tort conflict problems, other than guest statute situations....").

remains the general rule *in tort cases*." (Emphasis added).[10] The court did not indicate that this statement applied only to tortious conduct. Moreover, we do not believe that claims arising out of an airplane crash *require* the application of the *Cousins* "extraordinary circumstances" exception simply because of the transitory nature of the tort. *See Grancaris v. J.I. Hass Co., supra*, 79 A.D.2d at 551 434 N.Y.S.2d at 21 ("Tort cases, though transitory, still remain subject, in choice-of-law matters, to the rule of *lex loci delicti*....") Finally, the additional compensation the decedent's beneficiaries would receive if Greek law were applied hardly seems to be an extraordinary circumstance that would satisfy the *Cousins* exception. *See Rakaric v. Croatian Cultural Club, supra.*

Even if a New York court applied interest analysis in the instant case, we do not believe that it would agree with plaintiff that the law of the decedent's beneficiaries' domicile should always be applied in aviation wrongful death cases because that jurisdiction has the superior interest.[11] This court has observed that " 'a domiciliary

[10] That the New York Court of Appeals never totally rejected the rule of *lex loci delicti* is apparent from a number of earlier opinions. *See, e.g., Neumeier v. Kuehner, supra*, 31 N.Y.2d at 131, 286 N.E.2d at 459, 335 N.Y.S.2d at 72 ("What the *Babcock* case taught and what modern day commentators largely agree is that *lex loci delictus* is unsoundly applied if it is done indiscriminately and without exception. It is still true, however, that *lex loci delictus* is the normal rule....") (Breitel, J., concurring) (citations omitted).

[11] In support of its argument, plaintiff contends that in aviation wrongful death cases New York courts always apply the law of the decedent's or the beneficiaries' domicile. The Public Administrator cites *Junco v. Eastern Air Lines, Inc.*, 399 F. Supp. 666 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976); *Gordon v. Eastern Air Lines, Inc.*, 391 F. Supp. 31 (S.D.N.Y. 1975); *Thomas v. United Air Lines, Inc.*, 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969); and *Long v. Pan Am. World Airways*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965). All

conceptualism that rest[s] on a vested right accruing from the fact of domicile' [should not be substituted] for New York's sophisticated 'interest analysis' approach to choice of law problems. The New York precedents require more." *Rosenthal, supra*, 475 F.2d at 444 (quoting *Miller v. Miller*, 22 N.Y.2d 12, 29, 237 N.E.2d 877, 887, 290 N.Y.S.2d 734, 748 (Breitel, J., dissenting)). *See also Tooker, supra*, 24 N.Y.2d at 580-81, 249 N.E.2d at 401, 301 N.Y.S.2d at 528-29.

In applying governmental interest analysis to a choice-of-law problem, a court examines the policies underlying the alleged conflicting laws to determine which state has the greatest interest in the application of its own law. *See id.* at 576-77, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525-26. Additional factors that a court considers in this

(Footnote 11 continued)
of these were decided before *Cousins* and all are factually distinguishable from the instant case. In not one did the aviation disaster occur within the forum state, and, more important, other substantial contacts with the decedent's domicile militated against the application of the law of the place of the wrong.

In addition, as the above discussion of the recent history of New York's conflict-of-law rules indicates, the precedential value of the older cases has been diminished by the evolution of the law. *Long*, for example, relied on the "most significant relationship" branch of the governmental interest analysis, confirmed by the court in *Dym v. Gordon, supra*. *Dym*, however, was later discredited by Tooker, supra, 24 N.Y.2d at 574-76, 249 N.E.2d at 397-98, 301 N.Y.S.2d at 523-25. The *Tooker* case "looked to the law of the state with the 'superior interest' in having its policy or law applied." *Rosenthal, supra*, 475 F.2d at 442 (citation omitted). In *Long*, the court held that Pennsylvania law applied in an action by a Pennsylvania decedent's estate against a New York corporation, arising out of a crash in Maryland. The court found that New York was a disinterested forum. 16 N.Y.2d at 342, 213 N.E.2d at 799, 266 N.Y.S.2d at 517. Whether after *Tooker* the Court of Appeals would reach the same conclusion is an open question, but it is unlikely that given a similar situation it would summarily conclude that New York as the forum had no interest in the case. *See Cousins, supra.*

process are "the domiciles of the parties, the place where the tortious conduct occurred and where the injury was suffered." *Bing v. Halstead*, 495 F. Supp. 517, 520 (S.D.N.Y. 1980). The lower court, utilizing this approach, found that New York, as the state where the crash occurred and as the forum state, had a greater interest in the application of its own law.

Plaintiff has not persuaded us that the result should be otherwise. This is not a situation where one party seeks the application of an anachronistic law that would drastically limit or eliminate the damage award. *See Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y..S.2d 133 (1961); *see also Rosenthal, supra*, 475 F.2d at 446. Nor will an unjust or anomolous result occur if New York law is applied. *See Babcock, supra.* Both Greece and New York in their wrongful death statutes provide full and adequate compensation for the beneficiaries of decedents. New York, however, has a strong public policy to " 'specifically [limit] recovery in wrongful death actions to pecuniary damages resulting from decedent's death.' " *Garland, supra*, slip op. at 7419 (quoting *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939, 940 n.1 (2d Cir. 1968)). In addition, New York, in order to discourage forum shopping and encourage business within the state, has a governmental interest in assuring that defendants will not be subject to damage awards larger than those provided for by state law.[12] Greece also

[12] Although only the United States responded to the Public Administrator's appeal of the choice-of-law issue, at the time the motion was made Eastern was still actively engaged in the litigation. Thus, the contacts of both defendants are relevant here. Eastern is incorporated in the State of Delaware and has its principal place of business in Florida. It does substantial business in New York. The United States, of course, is neither incorporated nor domiciled in any one state. If either defendant were domiciled in New York this would be a much easier case.

has a governmental interest in this action. It has an interest in assuring that its domiciliaries receive compensation for loss of consortium and the survivor's grief. While the policy considerations underlying the Greek laws are not clear from the record, Greece's interest in the application of its own law is not compelling since under New York law the beneficiaries will receive sufficient compensation to avoid becoming a burden to society. Accordingly, plaintiff has not demonstrated that Greece has enough of an interest in the application of its law to displace New York's interests in the application of its own law.[13] New York is the forum; the tortious conduct occurred in the state; and the defendants have substantial contacts with the state. *See Cousins, supra; Tooker, supra; see also Walkes v. Walkes,*

(Footnote 12 continued)
Even though one court has reached a contrary conclusion concerning the importance of a defendant's New York domicile when this is also the tort locus, *see Haydu v. Hosp. for Joint Diseases Orthopaedic Inst.*, 557 F. Supp. 577 (S.D.N.Y. 1983), we believe that the second *Neumeier* rule, *see supra* note 7, while not necessarily applicable to wrongful death actions, suggests that the New York Court of Appeals would apply its own law if the defendants were domiciled in New York and the tort occurred there. *See Walkes v. Walkes, supra.*

[13] Under the principles espoused by the late Professor Brainerd Currie—the leading exponent of "interest analysis"—the forum court would normally apply its own law unless the court found that another state had an interest in the application of its policy and the forum state had no interest. *See Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L. J. 171, *reprinted in* B. Currie, *Selected Essays on the Conflict of Laws*, 177, 183-87 (1963). Thus, under this system, in cases where a true conflict exists or the forum state is disinterested it would apply its own law. *Id.* In contrast, under the system of interest analysis that New York has evidently adopted, *see Cousins, supra; Neumeier, supra; see generally* Korn, *supra* note 6, at 880-81, the law of the place of the wrong normally applies unless another state has a significant interest in the application of its own law. Under either approach New York law would be applied in this case since the place of the wrong and the forum are the same, and since Greece has not demonstrated that it has an interest significant enough to displace the normal rule.

465 F. Supp. 638 (S.D.N.Y. 1979).

Thus, under either a government interest analysis approach or the rule of *lex loci delicti*, the law of New York should be applied to this case. Having determined this, we need not consider the government's alternate argument that under the FTCA a claim may not be brought against the United States if it is based on a foreign law. Nor is it necessary for us to decide whether a New York court would accept the public policy considerations relied on by the court in *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), to apply the law of the forum.

2. *Prejudgment Interest on the Warsaw Convention Damage Award*

The Public Administrator asserts that the district court erred in holding that the plaintiff could not recover prejudgment interest pursuant to New York law[14] on the $75,000 damage award that it received from Eastern. We disagree.

Article 22 of the Warsaw Convention[15] provides in

[14] Prejudgment interest in a wrongful death action under the New York statute is considered to be a matter of substantive law. *See Circle Line Sightseeing Yachts, Inc. v. Storbeck*, 325 F.2d 338, 341 (2d Cir. 1963); *Davenport v. Webb*, 15 A.D.2d 42, 222 N.Y.S.2d 566 (1st Dep't 1961); *aff'd*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

Under New York law prejudgment interest starting from the date of death is added to the damage award. N.Y. Est. Powers & Trusts Law § 5-4.3 (McKinney 1981). Interest is calculated at a rate of 6% to June 25, 1981 and 9% thereafter. N.Y. Civ. Prac. Law § 5004 (McKinney & Supp. 1983). Thus, the amount of interest on $75,000 from the date of Hadzis' death until Eastern's deposit with the Clerk of the Court would be $31,604.79.

[15] For a history of the Warsaw Convention, which was adopted

pertinent part that:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [about $8,300 in 1934]. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs [about $8,300 in 1934]. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.[16]

See supra note 3.

In 1965, the United States, dissatisfied with the inadequate liability limits afforded its citizens under Article 22, filed a formal notification of denunciation of the Convention to be effective May 15, 1966. Fearful that the world's largest air power would withdraw from the Convention, the majority of airlines signed what has become known as the Montreal Agreement. *See Reed v. Wiser*, 555 F.2d 1079, 1087 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977);

(Footnote 15 continued)
in 1934, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

[16] Article 17 of the Convention, under the chapter providing for the liability of carriers, states that;

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

See supra note 3.

Day v. Trans World Airlines, Inc., 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *see generally* Lowenfeld & Mendelsohn, *supra* note 15, at 563-596. Under the agreement the airlines agreed to be subject to absolute liability unless the passenger himself was at fault,[17] *see Day v. Trans World Airlines, Inc., supra*, 528 F.2d at 36. Furthermore, paragraph 1(1) of the Agreement states that:

> The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

See supra note 4.

The Public Administrator argues that since paragraph 1(1) of the Montreal Agreement specifically states that the "$75,000 [is] inclusive of legal fees and costs" but makes no reference to the payment of prejudgment interest,[18] the absence of express language addressing

[17] The Montreal Agreement did not, however, affect Article 25 of the Convention which provides for recovery beyond the limitation amount if the plaintiff proves "wilful conduct" on the part of the carrier.

[18] The Warsaw Convention also makes no reference to the payment of prejudgment interest. Moreover, the agreement raising the liability limit to $75,000 was intended to be only an interim provision. *See* 1 L. Kreindler, *Aviation Accident Law* § 12A.07[2] (1983); Lowenfeld & Mendelsohn, *supra* note 15 at 596. Indeed, the viability of the liability limitation provisions appears to be diminishing due to economic changes. *See Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3883 (U.S. June 13, 1983) (cargo loss limitation of liability provision of Article 22 prospectively unenforceable because of fluctuating gold prices).

prejudgment interest should be construed to mean that the figure is exclusive of prejudgment interest. According to the Administrator, his interpretation would advance one of the main purposes of both the Convention and the Agreement, namely, the speedy resolution of claims.

We are not convinced that the payment of prejudgment interest would necessarily have any impact on the speed with which claims under the Convention are resolved. *See* 1 L. Kreindler, *supra*, at § 12A.08[2]. Further, we are not satisfied that this is one of the main purposes of these agreements. In *Reed v. Wiser*,[19] *supra*, a previous case in which this court examined the underlying purposes of the Warsaw Convention, we stated that:

> It is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages....
>
> ....
>
> ...[A]t no time has this country every abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters.

[19] In *Reed* we held that airline employees are shielded by the liability limitation provision of the Warsaw Convention, as modified by the Montreal Agreement. We stated that:

> To permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits.

555 F.2d at 1069.

Id. at 1089 (emphasis in original) (footnotes omitted). We also noted that;

> Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of worldwide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved.

Id. at 1090 (footnotes omitted).

There is no indication that the contracting parties to the Montreal Agreement intended to modify these principles so that they would be liable for more than the fixed and definite sum of $75,000. *See id.* at 1089. *See generally* 1 L. Kreindler, *supra*, at § 12A.02-.06; Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. of Air L. & Com. 653, 665-71 (1980). Although the $75,000 limitation may be anachronistic, the awarding of prejudgment interest in excess of this amount would be contrary to the purposes of the two agreements and would thus undercut the fundamental intent of the framers.

Nor can any support be found for the Public Administrator's position in the language of either document. We have noted that the specific words of a treaty should be given " 'a meaning consistent with the genuine shared expectations of the contracting parties.' " *Reed, supra*, 555 F.2d at 1090 (quoting *Day v. Trans World Airlines, Inc., supra*, 528 F.2d at 35). The fact that the $75,000 figure in the Agreement is inclusive of attorney's fees cannot be

read to mean that it excludes prejudgment interest. Paragraph 1(1) of the Agreement also provides for an award of $58,000 *exclusive* of attorney's fees in States "where provision is made for separate award of legal fees and costs." In light of the damage limitation principle established in Article 22 of the Convention, *see id.* at 1089, it would appear that, if the signatories to the Agreement had intended to create any exclusions to the damage limitation figures, they would have included a specific provision in the agreement similar to the one concerning the separate award of legal fees and costs. *See Block v. Compagnie Nationale Air France*, 386 F.2d 323, 329 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). *Cf.* Lowenfeld & Mendelsohn, *supra* note 15, at 563, 568.

Furthermore, the Montreal Agreement must be read in the context of the Warsaw Convention. *See id.* at 597. The Convention indicates that any liabilities that the airlines may be subject to must be found within that document. Article 24 states that:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought *subject to the conditions and limits set out in this convention.*
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply....

See supra note 3 (emphasis added). In the five instances where the law of the forum is applicable, the articles so state explicitly. *Reed, supra*, 555 F.2d at 1092 (citing Sundberg, *Air Charter: A Study in Legal Development* 242 (Stockholm 1961)). An award of prejudgment interest

pursuant to the law of the forum is not a condition set out in the Convention. *See Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1246 (S.D.N.Y. 1975).

As a treaty adhered to by the United States, the Warsaw Convention is the supreme law of the land, *see Reed, supra*, 555 F.2d at 1093; *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971), and our duty is to enforce its provisions according to the intent of the framers. In the absence of any contrary intent on the part of the framers, we may not read into that document a provision that allows the payment of prejudgment interest above the $75,000 liability limitation.[20]

[20] None of the cases that the Public Administrator has cited in support of the proposition that the $75,000 amount is subject to prejudgment interest is persuasive. However, after oral argument in this case, the Court of Appeals for the Fifth Circuit rendered its decision in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984). In that case, another wrongful death action arising out of the crash of Flight 66, the fifth circuit reversed the lower court and held that prejudgment interest above the $75,000 limitation is permitted under the Convention. While observing that prejudgment interest on unliquidated tort claims was not favored in the common law, the court noted that it had awarded prejudgment interest in cases involving Title VII and unfair labor practices, among others, where it found that such an award was necessary to effectuate the underlying goals of the laws. *Id.* at 262-63. Turning to the legislative history of the Agreement, the court asserted that an important American goal at the Montreal Conference was to encourage the speedy resolution of claims by eliminating the issue of fault. To that end an absolute liability provision was adopted. Reasoning that "[a] potential award of pre-judgment interest advances the objective of encouraging speedy compensation to victims," *id.* at 264, the court held that "awarding pre-judgment interest is permissible under the Warsaw/Montreal body of law and is within the discretion of the court." *Id.* at 263.

The instant case, however, differs significantly from *Domangue*. Here the plaintiff seeks an award of prejudgment interest pursuant to state law. As we noted, and as the fifth circuit acknowledged, this is contrary to one of the major objectives of the Convention, namely the establishment of a "uniform body of world-wide liability" rules. *See*

3. The Evidentiary Rulings

The Public Administrator contends that the district court made two erroneous evidentiary rulings concerning the admissibility of testimony during the course of the non-jury trial. First, the Administrator argues that the lower court should have admitted the testimony of Mary Mooney, one of the survivors of the crash, on the issue of the decedent's pain and suffering during the moments between the time when the wing of the descending airplane

(Footnote 20 continued)
Reed, supra, 555 F.2d at 1090; *see also Domangue, supra*, 722 F.2d at 262 ("[T]he Warsaw Convention and Montreal Agreement were intended to act as a uniform international law which supplants each member nation's varied laws.") (citation omitted).

Moreover, we do not agree with the fifth circuit's interpretation of the Montreal Agreement. The speedy resolution of claims was apparently not an important United States objective at the conference. *See* Lowenfeld & Mendelsohn, *supra* note 15, at 572. The principle purpose of the United States at the Montreal Conference was to increase the liability limit to $100,000. The absolute liability provision was introduced as a means of getting the United States to accept a liability limit lower than $100,000, *see it.* at 563, 570-71, and was not one of the prime objectives of the American delegation. *See id.* at 572 ("The United States delegation was itself divided on [this] issue, and its instructions were not firm on the point."). Thus, the payment of prejudgment interest would not advance any of the underlying objectives of the Convention or the Agreement, but it would undercut, as we discussed above, two of the Convention's major objectives.

Finally, even if we were to adopt the fifth circuit's discretionary approach, as the district court noted, this case would not be an appropriate one for an award of prejudgment interest. After an initial question was settled regarding who would represent the Hadzis estate, *see Winbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219, 224-25 (2d Cir. 1980), the Public Administrator contested the application of the $75,000 limitation. Although he now contends that Eastern was liable for payment in full shortly after the crash, he argued, until the court granted *Eastern's* motion for partial summary judgment on this issue, that the provision did not apply because of a defect in Hadzis' ticket.

first struck the ground and the time of final impact. It was established in an offer of proof that Mooney, who was sitting about ten to fifteen feet behind Hadzis at the time of the crash, did not see Hadzis or know what happened to him during this five to ten second period. The Administrator argues, however, that her proffered testimony concerning the conditions within the airplane cabin was not irrelevant, as the court ruled. According to the Administrator, "if admitted, [this testimony would have been] sufficient circumstantial evidence to allow the trial court to draw the reasonable inference that Mr. Hadzis *probably* suffered consciously...." Brief of Plaintiff-Appellee-Cross-Appellant at 21 (emphasis added).

We do not agree. The question of relevancy is entrusted to the trial judge's discretion, *see United States v. Carter*, 522 F.2d 666, 685 (D.C. Cir. 1975); *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974), and turns in part on the rule of substantive law at issue. *See* 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[09], at 401-48 (1982). Under the law of New York, which governs in this case, *see supra* note 1, an award of damages for pain and suffering may not be based upon evidence that requires the fact finder to *speculate* upon the pain and suffering of a decedent prior to death. *See Fiederlein v. New York City Health and Hosp. Corp.*, 56 N.Y.2d 573, 435 N.E.2d 398, 450 N.Y.S.2d 181 (1982); *Huertas v. State*, 84 A.D.2d 650, 651, 444 N.Y.S.2d 307, 309 (3d Dep't 1981); *Anderson v. Rowe*, 73 A.D.2d 1030, 1031, 425 N.Y.S.2d 180, 181 (4th Dep't 1980). *See also Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 138, 428 N.Y.S.2d 535, 543 (4th Dep't 1980) ("In determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the *degree of consciousness, severity of*

pain, apprehension of impending death along with duration are all elements to be considered.") (emphasis added) (citations omitted). Accordingly, since Mooney did not see Hadzis or know what happened to him immediately before the crash, the district court did not abuse its discretion in ruling that her testimony was irrelevant to the question of his conscious pain and suffering.

As for the second contested ruling, the plaintiff argues that the district court erred when it ruled that certain proffered testimony of David Bunin ("Bunin"), plaintiff's economic expert, was inadmissible. The offer of proof made to the court demonstrates that Bunin was prepared to testify that a 2% negative growth rate factor should be applied to the award for lost future earnings, and that Hadzis would have been promoted to port captain, thus improving his earning potential.

The government argues that a number of adequate evidentiary and procedural grounds support the court's ruling. We agree. "[A] trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962) (citation omitted); *see also Taenzler v. Burlington N.*, 608 F.2d 796, 798 n.3 (8th Cir. 1979).

The record indicates that Bunin's proffered testimony came as a surprise to the government because it was not within the scope of the pretrail order nor produced on discovery and that Judge Bramwell excluded the testimony on these grounds.[21] In addition, the court found the

[21] We note that contrary to the government's contention surprise is not one of the enumerated grounds for the exclusion of evidence under

testimony regarding Hadzis' potential promotion to port captain to be speculative and, thus, irrelevant. *See* Fed. R. Evid. 401; *see also Fiederlein v. New York City Health and Hosp. Corp., supra.* The plaintiff has not demonstrated that the exclusion of this testimony was manifestly erroneous. Accordingly, the lower court is affirmed on this issue.

B. *The Appeal*

1. *The Ad Damnum Clause*

The district court erred in granting plaintiff's motion to amend the *ad damnum* clause. As a jurisdictional prerequisite to a suit under the FTCA an administrative claim must be filed with the appropriate federal agency before an action may be commenced against the United States. 28 U.S.C. § 2675(a). *See also Adams v. United States,* 615 F.2d 284, 286 (5th Cir. 1980); *Kielwien v. United States,* 540 F.2d 676, 679 (4th Cir.), *cert. denied,* 429 U.S. 979 (1976). Section 2675(b) provides further that:

> Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered

(Footnote 21 continued)
Federal Rule of Evidence 403. In fact, the Advisory Committee's Note to Rule 403 points out that surprise should not be a ground for exclusion of evidence and that "the granting of a continuance is a more appropriate remedy than exclusion of evidence." *See also* 1 J. Weinstein & M. Berger, *supra,* ¶ 403[01], at 403-12 to -13. While there may be some situations in which unfair surprise alone would constitute a ground for the exclusion of evidence under Rule 403, *see F & S Offshore, Inc. v. K.O. Steel Castings, Inc.,* 662 F.2d 1104, 1107-08 (5th Cir. 1981) (per curiam); *cf.* C. McCormick, *Evidence* § 185, at 440 (2d ed. 1972), we express no opinion on this matter at this time.

> evidence not reasonably discoverable at the time of presenting the claim to the federal agency, *or upon allegation and proof of intervening facts, relating to the amount of the claim.*

(Emphasis added).

Shortly before trial plaintiff moved pursuant to § 2675(b) to increase the *ad damnum* clause from $925,000 to $1,400,000. Plaintiff asserted that, in the six years since it filed the administrative claim, an unprecedented rise had occurred in the salaries paid to Greek captains and mates. Finding that this circumstance constituted an "intervening fact" within the meaning of § 2675(b), the court granted plaintiff's motion.

Under the circumstances of this case, however, the motion should not have been granted. While this is our first opportunity to examine § 2675(b), other courts that have ruled on the scope of this section have granted motions to amend *ad damnum* clauses only when an unexpected change occurred either in the law or in a medical diagnosis. For example, in *Husovsky v. United States,* 590 F.2d 944, 955 (D.C. Cir. 1978), the court held that a changed medical diagnosis predicting an increased life span constituted an "intervening fact" where sufficient evidence supported the inference that the amount of the original claim was based on plaintiff's life expectancy at the time the claim was filed and the increased damage award was sought on the basis of this change. In *Funston v. United States,* 513 F. Supp. 1000 (M.D. Pa. 1981), the district court held that the unpredicted adoption by the state supreme court of a new method of discounting the present value of lost future earnings constituted an intervening fact. The court granted plaintiff's motion to increase the *ad damnum* clause, "but

only to the extent that the increase is applicable to the fact that in submitting the administrative claim Plaintiff discounted his request for lost future earnings as required by then applicable law." *Id.* at 1007. *See also McDonald v. United States*, 555 F. Supp. 935, 957-62 (M.D. Pa. 1983); *Gallimore v. United States*, 530 F. Supp. 136 (E.D. Pa. 1982).

In all of these cases, there was some indication that the amount of the original claim was calculated on the basis of known facts at the time of the filing and that, subsequently, some new and previously unforeseen information came to light. Here, no such showing has been made. Although it is uncontroverted that the salaries of Greek seamen increased dramatically during the intervening six years, plaintiff does not claim that this was unforeseen. More important, he failed to assert sufficient concrete facts demonstrating that he relied on the old salary structure data in the calculation of his original $925,000 claim.

The FTCA, as a statute waiving sovereign immunity, must be complied with strictly. *See United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). If plaintiff were allowed to amend his *ad damnum* clause based upon the minimal showing he made in the district court, we would, in effect, be substituting the liberal pleading requirements of Federal Rule of Civil Procedure 15 for the narrower requirements of § 2675(b). This we may not do. *See Kubrick, supra.* Accordingly, we hold that the district court erred in granting plaintiff's motion to amend the *ad damnum* clause.

2. *Award of Damages*

The government contends that the $982,100 damage

award to Hadzis' estate is clearly excessive.[22] According to the government this resulted from (1) the use of the total offset method to discount the award to present value, (2) the erroneous calculation of the amount of support that Hadzis would have supplied to his family, and (3) the

[22] In its Findings of Fact and Conclusions of Law the district court found: that Hazdis was a 31 year old Greek sailor who had obtained the rank of chief mate at the time of his death; that he would have been promoted to captain not long after the crash; that he was away from home an average of ten months a year; that his gross earnings for the twelve months before his death were $18,482; that he earned an annual $2,000 bonus for work related to the loading and unloading of ships, a bonus which brought his gross income to $20,482 for the twelve months before his death; that with a life expectancy of 75 years he could continue to work as a capatin until age 62.5; that he would be eligible for a pension at age 50, even if he continued working; that at his death he was married and had two small children—one age 4-½ and the other age 11 months; that during one of the two months that he was home on leave he did necessary repairs around the house; that he was the sole support for his wife and children, that he provided approximately $2,000 per annum to his parents; that based on the testimony of plaintiff's two witnesses—Spyros Varras ("Varras"), the American representative for the PanHellenic Seamen's Federation, and Bunin, an actuarial economist—the "total offset" method was the appropriate means to determine the present value of the award for lost future earnings; that until age 50 80% of Hadzis' income would have gone to support his family and that thereafter, from age 50 to 75, the figure would have been 70%; and that, for Hadzis' wrongful death, the decedent's estate was entitled to $982,100 which included, among other things, $75,000 for each child for loss of guidance and $44,000 for loss of services to Mrs. Hadzis. *See* Decision and Order, *O'Rourke v. Eastern Air Lines, Inc.*, 76 Civ. 1025 (HB), dated June 21, 1982, *reprinted in* J.A. at 234-53.

The award can be summarized as follows:

Past lost support	$117,000
Future lost support	668,000
Loss of guidance	150,000
Loss of services	44,000
Funeral expenses	3,100
	$982,100

excessive awards for loss of parental guidance and services.[23] Although we do not agree with all of the government's contentions, we find that the district court made some errors in the calculation of the award, and that a retrial on the issue of damages is required unless the plaintiff is willing to remit 21% of the award.

The district court's use of the total offset method was not clearly erroneous or incorrect as a matter of New York law.[24] While we have suggested that a 2% discount

[23] The government also argues that the excessiveness of the award is demonstrated by its size relative to other wrongful death awards in factually similar cases, and by the fact that, if the award were conservatively invested, the first annual return would yield an amount much greater than the decedent's last annual salary. Both contentions are specious.

As this Court has previously pointed out, a "simplistic comparison of current bond yields with [the decedent's annual] income ignores the complexity of this (and almost every) damage-award calculation. *Vasina v. Grumman Corp.*, 644 F.2d 112, 119 (2d Cir. 1981). Indeed, it is premised on a basic misunderstanding of the economic principles that must be considered in calculating the present value of a lump sum award for lost future earnings in an inflationary economy. *See generally Jones & Laughlin Steel Corp. v. Pfeifer, supra*, 103 S.Ct. at 2550-55; *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 34-39 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); Note, *Determining the Effect of Inflation on Lost Future Earnings: What Price Equity?*, 57 St. John's L. Rev. 316 (1983).

As for any comparison to other wrongful death awards, "[i]t is recognized [under New York law] that there is no magic or precise mathematical formula for computing damages in a case of this kind and, since an award [for wrongful death] must be based upon intangible pecuniary losses, it is not surprising that differences of opinion occur. Each case is necessarily different." *Rinaldi v. State*, 49 A.D.2d 361, 374 N.Y.S.2d 788, 792 (3d Dep't 1975). *See also Brock v. State*, 77 A.D.2d 670, 429 N..Y.S.2d 778 (3d Dep't 1980).

[24] Although both the government and the Public Administrator assumed on appeal that our recent decision in *Doca, supra*, governs the issue of discounting, we must first look to New York law. While a

rate would be fair to all sides in cases involving federal law, *Doca, supra*, 634 F.2d at 39, this court has also stated that "we are not prepared to require any one particular method by which inflation should be taken into account in estimating lost future wages," *id.*, and that "[l]itigants are free to account for inflation in other ways, or, if they use the adjusted discount rate approach, to offer evidence of a rate more appropriate than 2%." *Id.* at 40.

The plaintiff's actuarial economist testified that, after studying data on the decedent's earning potential and the Greek economy, it was his conservative opinion that future interest and inflation rates in Greece would be equal and would cancel each other out.[25] These factual findings were adopted by the district court. *See* Findings 43-45, J.A. at 241-42.

The government now contends that the lower court's use of the total offset approach was without an adequate factual basis. The government, relying on language from *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406, 415 (2d Cir.

(Footnote 24 continued)
number of states have adopted a form of discounting that takes inflation into account, *see, e.g., Kaczkowski v. Bolubasz*, 491 Pa. 461, 421 A.2d 1027 (1980); *see generally Pfeifer, supra*, 103 S.Ct. at 2551; Note, *supra* note 23, at 329 n.59, New York law on this point is relatively undeveloped. *See Dennis v. Dachs*, 85 A.D.2d 223, 448 N.Y.S.2d 1 (1st Dep't 1982), *see also Dullard v. Berkeley Assocs. Co.*, 606 F.2d 890, 896 (2d Cir. 1979). While it is impossible to predict the method, if any, that the Court of Appeals will adopt to determine the role that inflation should play in the discounting of damage awards, *cf. Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 390-93 (2d Cir. 1975) (Friendly, J., concurring dubitante), there is no basis for concluding that the Court of Appeals would rule that the method applied by the lower court in this case was incorrect as a matter of New York law.

[25] Indeed, the plaintiff attempted to introduce evidence to prove that a negative discount figure should be applied to increase the amount of the award. *See supra* discussion at pate 23.

1982), argues, in essence, that since plaintiff's economic expert—Bunin—was not an expert on the Greek maritime industry, he was not qualified to testify about future wage increases in that industry. Therefore, the government claims an insufficient factual basis was established for the court's adoption of the total offset method.[26]

We do not agree. If the government had wanted the lower court to adopt one of the alternate discount rates that it now urges upon us, it should have had its own experts testify on this matter.[27] The government was well aware before trial of Bunin's qualifications and that he intended to propose that the court adopt the total offset method for discounting the award. *See* J.A. at 73, 652-53. Nevertheless, the government did not object to Bunin's qualifications to testify on this matter during the trial. More important, the government did not introduce any experts of its own to refute Bunin's contentions; it "contented itself with cross-examination of plaintiff's expert." *Vasina v. Grumman Corp., supra*, 644 F.2d at 119. It is within the sound discretion of the trial judge to assess the

[26] In *Stratis*, a damage action brought by a Greek seaman who survived the crash of Eastern Flight 66, we held that "the testimony about past and future losses, presented through a Greek lawyer rather than a person expert in the marine industry, is insufficient to support the award." 682 F.2d at 415. This case is clearly distinguishable. Plaintiff's expert witness, Bunin, is an actuarial economist. Moreover, the method that Bunin used to determine the lost income—a projection of future wages based upon past labor contracts and wage statistics—has been recently approved by a lower New York court. *See Dennis v. Dachs, supra.*

[27] The government argues that, based on the data supplied by plaintiff's expert and the analysis in *Doca, supra*, a 10%, 5% or 2% discount rate would be more appropriate than the total offset method. The alternate percentages were derived from various scenarios in which some of the assumptions put forward by the plaintiff's expert are accepted and others rejected.

persuasiveness of expert testimony as to estimates and evaluations concerning damages. *See Ludlow Corp. v. Textile Rubber & Chem. Co.*, 636 F.2d 1057, 1060 (5th Cir. 1981); *Pittman v. Gilmore*, 556 F.2d 1259, 1261 (5th Cir. 1977). Furthermore, economics is not an exact science allowing an expert to determine the precise value that a lump sum award will have to a decedent's estate over a period spanning forty years. See *Pfeifer, supra*, 103 S.Ct. 2551-55; *Doca, supra*, 634 F.2d at 36-39. Accordingly, the district court's adoption of the total offset method to determine the present value of the damage award was not clearly erroneous in light of the evidence submitted.

However, the district court's determination of the proportion of the decedent's income that would have gone to the support of his family is more problematic. The district court, relying on the testimony of Bunin, found that Hadzis provided his family with 88% of his earnings. The court reduced this figure to 80% to account for that portion of the money that was saved and later put to his own personal use. *See* Finding 47, J.A. at 242. At the trial, however, Bunin testified that Hadzis' gross pay for the 12 months preceding his death was approximately $18,500 and that he gave his family approximately $14,500. *Id.* at 629. He also testified that Hadzis used $2,000 for his own personal expenses and that he was carrying approximately $2,500 when the plane crashed. *Id.* at 630. The government argues that since $14,500 is 78% of $18,500 rather than 88%, Bunin obviously made a mathematical error in his calculation that the district court repeated in its findings of fact. *See* Finding 47, J.A. at 242.

The government contends that the amounts for past and future support should therefore be reduced by 10%. We agree, and unless the plaintiff is willing to remit 10%

of the amounts awarded for support a new damage trial must be conducted.[28]

There is no support for the government's additional contention that the district court erred in the calculation of lost support because it excluded $2,000 that Hadzis sent annually to his parents. The district court acknowledged the existence of the gift, *see supra* note 22, but found that this amount should not be included in the calculation for lost support on the theory that this amount was cancelled out by $2,000 in bonuses that Hadzis earned each year. *Id.* The bonuses also were not included in the calculation. Although the government contends that the bonuses were illegal and should not have been considered, the district court found that they were "customary and legitimate [and] could have been expected to continue throughout... Hadzis' career." Finding 19, J.A. at 238. The government presents no evidence to the contrary, and while an ambiguity appears in the record concerning the calculation of lost support,[29] the ruling that the bonus cancelled out the gift was not clearly erroneous.

Both the $75,000 awards for each child for loss of parental guidance and training, Findings 59, 60, J.A. at 244, and the award of $44,000 for loss of services, Finding 61, *id.*, are so excessive as to shock the Court's conscience. *See Franchell v. Sims*, 73 A.D.2d 1, 6, 424 N.Y.S.2d 959, 962 (4th Dep't 1980). Hadzis was away at sea ten months

[28] Thus, the support figures for the years prior to Hadzis reaching age 50 would be reduced from 80% to 70% and from age 50 to 75 from 70% to 60%. *See* Findings 47-48, 51-53, J.A. at 242, 243-44.

[29] It is unclear from the record whether the $2,500 that Hadzis was carrying with him on the trip was for his personal use or the use of his family, or some combination thereof.

a year, and he spent one of his two free months on vacation with his wife and child. The amount of time he could have spent on parental guidance or household repairs and services was minimal. The awards are excessive and should be reduced by 50%.

In light of the above, we would grant a conditional remittitur to $779,981.[30] If the plaintiff is unwilling to accept this, a new trial on damages is hereby ordered.

O'Rourke v. Eastern Air Lines and USA, Nos. 83-6065, 71

Pratt, *Circuit Judge*, concurring and dissenting:

I concur in that part of the majority opinion addressed to the appeal by the United States of America, but dissent from the disposition of plaintiff's cross-appeal because it denies plaintiff prejudgment interest.

While the central purpose of the liability limitation established by the Warsaw Convention, as modified by the Montreal Agreement, was "to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages," *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir. 1977) (emphasis in original), that purpose would be unaffected by requiring Eastern Air Lines

[30] The amounts awarded would be reduced to the following figures:

Past lost support	$102,375
Future lost support	577,506
Loss of guidance	75,000
Loss of services	22,000
Funeral expenses	3,100
	$779,981

to pay interest on the $75,000 award from the time of the accident to the time of judgment. As soon as the accident occurred, Eastern knew exactly what its maximum liability under the Montreal Agreement would be: $75,000 times the number of international passengers on board the ill-fated aircraft.

More importantly, as the various lawsuits wore on, Eastern had the use of that money and was able to earn interest on it. By the majority's own calculation, plaintiff's $75,000 recovery here would have earned $31,604.79 in interest even if calculated at New York's unrealistically low legal rates. Stated differently, therefore, "the cost to [Eastern Air Lines]," *Reed v. Wiser*, 555 F.2d at 1089, of the damages resulting from the death of plaintiff's decedent, Alexandros Hadzis, is not the $75,000 intended by the Montreal Agreement, but no more than $43,395.21, and perhaps significantly less.

Since Eastern was clearly and absolutely liable to pay plaintiff the $75,000 from the moment of death, interest on that sum earned during the legal proceedings required to compel its payment should accrue to plaintiff, not Eastern. Airline defendants and their insurers should not have an incentive to use the litigation process in order to reduce costs by delaying payment of moneys clearly due and owing.

Absent any language in, or purpose behind, either the Montreal Agreement or the Warsaw Convention that would preclude prejudgment interest, I agree with the view of the Fifth Circuit in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), that prejudgment interest should be available to victims of air disasters who recover under the Montreal Agreement.

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S
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No. 83-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EASTERN AIR LINES, INC.,

Petitioner,

v.

ROBERT F. MAHFOUD, ETC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT ROBERT F. MAHFOUD IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether there is a conflict in the circuits on the issue of whether a court may award interest in a Warsaw Convention/Montreal Agreement death case wherein the negligent airline has wrongfully witheld payment of damages over several years, through misuse of legal process, so as to realize monetary gain to the detriment of the innocent claimant.

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STATUTES:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 300 (reprinted in 49 U.S.C. § 1502, T.S. No. 876, 137 L.N.T.S. 11) [Warsaw Convention] 2, 3, 4, 5, 6, 8

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by Order No. E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966) [Montreal Agreement] 2, 3, 4, 5, 6, 7, 8

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BRIEF OF RESPONDENT ROBERT F. MAHFOUD IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Robert F. Mahoud, etc. submits this brief in opposition to the petition for a writ of certiorari filed by Eastern Air Lines, Inc.

STATEMENT OF THE CASE

The petition of Eastern Air Lines, Inc. ["Eastern"] gives only a brief outline of the facts upon which the District Court and the Second Circuit based the award of pre-judgment interest. Since the issue presented is heavily fact-dependent, respondent Robert F. Mahfoud ["Mahfoud"] believes that a fuller discussion is essential to a proper disposition of this case.

This action arises from the crash of Eastern Air Lines Flight 66 on June 24, 1975 at the J. F. Kennedy International Airport, New York. The action was brought on behalf of the minor children of Bernard and Odile Mahfoud who were killed in the crash. The Mahfoud decedents were fare-paying passengers engaged in international travel and were subject to the provisions of the Warsaw Convention, as supplemented by the Montreal Agreement "[Warsaw/Montreal"]. At all times subsequent to the accident, Eastern was aware that Warsaw/Montreal was applicable.[1]

Robert F. Mahfoud filed suit on behalf of the minor children in the United States District Court, Western District of Louisiana, on December 5, 1975.

The complaint was brought by Robert F. Mahfoud in his capacity as both administrator of the successions of the decedents and as legal tutor of the minor children of the decedents.

---

[1] In an affidavit attached to Eastern's motion for partial summary judgment, Eastern Attorney Walter E. Rutherford states under oath in part the following:

"Mrs. Mahfoud's passenger ticket was apparently destroyed in the accident, but Eastern retained a coupon for Mr. Mahfoud's and Mrs. Mahfoud's transportation on Eastern Flight 66 when they presented themselves for boarding. As appears from Mr. Mahfoud's ticket and Mrs. Mahfoud's flight coupon, decedents' tickets were issued in Paris, France on June 14, 1975 for decedents' passage on Air France 067 on June 16, 1975 from Paris to Houston, Texas; on Continental Airlines Flight 420 on June 16, 1975 from Houston, Texas to New Orleans, Louisiana; on Eastern Flight 66 on June 24, 1975 from New Orleans, Louisiana to New York, New York; and return on Air France to Paris, France from New York, New York. *Thus, at the time of the accident, decedents were engaged in international transportation, pursuant to the Warsaw Convention/Montreal Agreement.*" (Emphasis Supplied).

Eastern pleaded the limitation of liability of the Warsaw/Montreal and capacity to sue as affirmative defenses.

Mahfoud has never contended that Warsaw/Montreal was not applicable.

Mahfoud was qualified to bring the action in either Louisiana or New York.[2]

On July 7, 1976 Eastern was provided both Letters of Legal Tutorship, issued October 17, 1975 and Letters of Administration, issued September 15, 1975 to Mahfoud.

On September 11, 1978, the date set for liability trial, co-defendant United States of America advised the District Court and the parties that the government, while not admitting negligence, would consent to a judgement against it in the passenger cases.[3]

Prior to the announcement by the government, Eastern and the United States entered into an agreement whereby Eastern agreed to pay 60% and the government 40% of any passenger settlement or damages judgment. As a condition to the agreement, Eastern's insurers were given full control over all subsequent matters, including damage discovery, damage trials, appeals and any decisions relating to the settlement or non-settlement of a particular passenger case. (RA. 12-16)[4]

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[2] In Louisiana the next of kin, or in this case the legal tutor of the minors may bring the action, whereas in New York only the legal representative may do so.

[3] In its letter presented to the Court the government stated in part:

"We appreciate the need to compensate the families of the innocent passengers in this case and feel that a trial will unduly waste the time of the Court and the parties."

[4] References preceded by "RA" refer to Respondent's Appendix in this brief; those preceded by "A" refer to Petitioner's Appendix.

On September 18, 1978 Mahfoud moved for summary judgement and judgment on the pleadings against defendant Eastern pursuant to Warsaw/Montreal.

Eastern resisted the motion for summary judgement and judgment on the pleadings on the procedural ground that the motion was brought on by notice of motion or oral motion only and was not supported by affidavits or other proof independent of the pleadings.

The motion was granted by the Eastern District of New York with the provision that Eastern was not precluded from raising its defense of lack of capacity to sue, or any other defense it might have. Eastern applied for Section 1292(b) certification, which was granted, and resulted in *Windbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219 (2nd Cir. 1980).

Long before Eastern's appeal was handed down by the Second Circuit jury trial on Eastern's liability was commenced September 18, 1978 and on October 25, 1978 the jury found Eastern negligent and liable.

Eastern then appealed the liability verdict to the Second Circuit which affirmed as set for in *In re Aircrash at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d 67 (2nd cir 1980).

With a damages trial imminent in New York, Eastern voluntarily withdrew its "procedural defense" and filed its own motion for summary judgment pursuant to Warsaw/Montreal.

Without ruling on the motion, the Eastern District of New York in May, 1982 transferred the action back to Louisiana *sua sponte* for a trial on damages.

Eastern reasserted its motion for summary judgment pursuant to Warsaw/Montreal in the Western District of

Louisiana. Mahfoud agreed with Eastern that Warsaw/Montreal governed Eastern's liability but asserted an entitlement to pre-judgment and post-judgment interest over and above the Montreal limitation because of the many years delay in offering Montreal damages made possible by its procedural artistry and complete control over the litigation through its agreement with the government. (RA. 5-11).

By order filed November 16, 1982, Chief Judge Scott, Western District of Louisiana, found that the Warsaw/Montreal damages limitation was applicable but that it was unconscionable to permit Eastern to delay litigation to an extent that a smaller amount of money may be invested in order to pay a $75,000 claim, and that pre-judgment and post-judgment interest should be applied. (RA.10,11).

On December 2, 1982, three days before the damages trial against the United States of America, and approximately 7 ½ years after the deaths of Bernard and Odile Mahfoud while engaged in international travel, Eastern deposited into the registry of the court $150,000 representing $75,000 per passenger seat.

The District Court denied Eastern's motion for reconsideration and on April 2, 1983 entered judgment, *inter alia* limiting Eastern's liability to $150,000 plus pre-judgment interest from the date of filing until December 2, 1982.

REASONS FOR DENYING THE WRIT

There is no conflict between the decisions of the United States Court of Appeals, Fifth Circuit and the United States Court of Appeals, Second Circuit.

Both Circuits agree that the basis for adding interest cannot be the failure of the drafters of the Montreal

Agreement to include a specific phrase including interest in the $75,000 limitation. (RA.8 and A.28,29).

Mahfoud never contested that the Warsaw Convention/Montreal Agreement applied, and, in fact, moved for summary judgment on that issue. His motion was resisted by Eastern on purely procedural grounds which were later withdrawn at a time convenient for Eastern's insurers after Eastern was found negligent and liable by jury and just before the damages trial. The court found that Eastern was responsible for delaying payment of Warsaw/Montreal damages. (RA. 10-11). This delay was continued for approximately 7 ½ years despite the fact that Eastern knew it was liable for the damages immediately upon checking the ticket coupons. Since Eastern was clearly and absolutely liable to pay plaintiff the $75,000 per seat from the moment of death, interest on that sum earned during the legal proceedings required to compel its payment must accrue to Mahfoud and not to Eastern.

The O'Rourke plaintiff, on the other hand, vigorously contested Warsaw/Montreal on the ground that a defective ticket was issued to her decedent. (A.30-31, note 20). Both the trial court and the Second Circuit found that Eastern and its insurer did not delay payment of Warsaw/Montreal damages, since the issue was contested. Further, the Second Circuit stated that *O'Rourke* was not an appropriate case for pre-judgment interest, in that the claimant sought pre-judgment interest in a post-judgment motion pursuant to the state law of New York. (A.30, note 20).

The Fifth Circuit concurs that state law is not applicable, *Domangue* v. *Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984), but holds that awarding pre-judgment

interest is within the discretion of the court on an equitable basis. Id. at 263-64.

In *Domangue*, the court states:

> "Factors for the Court to consider in deciding whether to award pre-judgement interest thus may include the length of time between the tort and judgment, and whether the defendant caused or contributed to any delay. A potential award of pre-judgment interest advances the objective of encouraging speedy compensation to victims, and ensures that the aim of obtaining a high recovery for victims and their survivors is not defeated by a defendant's simple strategy of delaying payment or judgment until the award is diminished in actual value."
>
> * * *
>
> "Allowing such interest does not defeat the objective of establishing a limit to liability so that air carriers may find companies willing to insure them, since air carriers may avoid significant interest charges by avoiding delay in the disposition of claims." Id. at 264.

Montreal Agreement negotiations in 1966 and the United States position thereto support the 5th Circuit. The United States contemplated prompt recovery to the passengers from the airline in return for a maximum damage limitation. A. F. Lowenfeld, Chairman of the United States Delegation to the Montreal Conference, 1966, and A. I. Mendelsohn, Office of Legal Advisor, Department of State, commenting on the Montreal negotiations state:

> "But in the present context of acceptance of a limit on liability at a level lower than the desired goal, absolute liability was viewed primarily in terms of the prospect of quicker and less expensive settlements, with less time and less money going for litigation

than would have prevailed under the common law system, had the denunciation gone into effect. Experience had shown that in major personal injury and death cases litigation and delay seriously impair the value of the compensation eventually awarded. The prospect of accident investigation at remote locations and of complex conflict of laws questions gave added emphasis to this problem in respect to international aviation accidents. The attraction of absolute liability was that it would benefit most those who need the damage payments most urgently - the dependents of a breadwinner of modest means. For example, if the widow and children of a school teacher killed while he was on an excursion flight to Europe could get paid quickly at or near the limit, they would be far better off than if they had to go through painstaking accident investigation and litigation, which might well take several years to complete and result in net payments to them of thirty to fifty percent less than the gross amount awarded.

> Essentially, then, the success of the arrangement will depend on the accuracy of the prediction that cases will be settled quickly and economically. It may well be that in the case of principal wage earners in the United States, claims will be handled like health or life insurance claims - with forms and perhaps interviews with the plaintiff and with the decedent's employer, but without any litigation."

Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 600 (Citations omitted).

The Montreal Agreement raised an air carrier's maximum liability from $8,300.00 to $75,000.00 while at the same time waiving the airlines Article 20(1) defense under the Warsaw Convention.[5] The result, as stated by the Department of State was that:

[5] Article 20(1) of the Warsaw Convention provided that the airline could avoid liability thereunder by establishing that it had taken all necessary measure to avoid the damage or that is was not possible to take such measures.

> "Airlines in international travel will be absolutely liable for up to $75,000 per passenger regardless of any fault or negligence. Recovery of those who need it most will thus be maximized and *expedited*."

Department of State Press Release No. 110, May 13, 1966 (Emphasis supplied).

The major goal of the Montreal Conference by the United States was a higher limitation on liability, but the important additional American objective was to encourage the speedy disposition of claims. *Domangue* v. *Eastern Air Lines, Inc.*, *supra* at 261; Lowenfeld & Mendelsohn, *supra*.

It is unconscionable to let an airline, or its insurer, delay litigation by use of legal process for its own monetary gain. Interest on money withheld is properly charged and does not violate the provision of Warsaw/Montreal. Willful witholding of money damages was not an issue before the Second Circuit in *O'Rourke*. There is no conflict in the circuits.

CONCLUSION

The *Mahfoud* and *O'Rourke* decisions are not in conflict; there are no reasons for review by this Court; the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE E. FARRELL
Counsel of Record
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1216 16th Street, NW
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(202) 833-2006
Attorney for Respondent
Robert F. Mahfoud

June 6, 1984

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 75-1292

ROBERT MAHFOUD

- VS -

EASTERN AIRLINES, INC.

U.S. DISTRICT COURT
WESTERN DISTRICT OF
LOUISIANA
FILED
NOV 16, 1982
ROBERT M. SHEMWELL,
CLERK

HEALEY, PARRELL & LEAR
NOV 16, 1982

RULING

Suit was commenced in this court on December 4, 1975 to recover damages for the death of Bernard F. Mahfoud and Odile W. Mahfoud. The principal defendant was Eastern Airlines, Inc. (Eastern). Decedents were killed when Eastern Flight 66, enroute from New Orleans to New York City, crashed on its approach to John F. Kennedy International Airport, Queens, New York, on June 24, 1975.

This action was transferred to Federal court in New York on February 4, 1976 pursuant to 28 U.S.C. § 1407 by the Judicial Panel of Multidistrict Litigation for consolidated pretrial proceedings. In June 1976, plaintiff filed an amended complaint naming the United States of

America as a defendant. In May 1982, pursuant to 28 U.S.C. § 1404(a), the case was transferred back to this court.

MOTION IN LIMINE

Defendants have filed a Motion in Limine seeking a determination of the law applicable to the issue of damages in this case: the law of New York, or the law of Louisiana.

Plaintiffs' claims against the United States are governed by the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. § 1346 *et seq*. The F.T.C.A. provides that the Government's liability for damages shall be determined in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). This requires the court to apply the entire law of the place of the accident, including its choice of law rules. *Richards* v. *United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Therefore, plaintiffs' claims against the United States are governed by the choice of law rules of New York, the place of the accident.

In determining choice of law, New York courts draw a distinction between issues of conduct and damages, and apply different choice of law standards to these issues within the same case. See *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2nd Cir. 1962); *Bing v. Halstead*, 495 F.Supp. 517 (S.D. N.Y. 1980); *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963).

When conduct is at issue, the doctrine of lex loci delecti is generally applied, because a jurisdiction has a strong interest in regulating conduct within its borders. *Gordon v. Eastern Airlines*, 391 F.Supp. 31 (S.D. N.Y. 1975); *Babcock, supra. See also Junco v. Eastern Airlines, Inc.*, 399 F.Supp. 666 (S.D. N.Y. 1975), *aff'd* 538 F.2d 310

(2nd Cir. 1976). However, when damages are at issue, New York has adopted a "grouping of contacts" or "governmental interests" approach to resolving conflict of law problems. See *Junco, supra; Gordon, supra; Thomas v. United Airlines*, 24 N.Y.2d 714, 31 N.Y.S.2d 973 (1969); *Miller v. Miller*, 222 N..Y.2d 12, 237 N.Y.E.2d 877 (1968); *Babcock, supra.*

Plaintiffs' decedents herein, Bernard and Odile Mahfoud, husband and wife, were domiciliaries of Louisiana. Bernard had resided in Louisiana since November 21, 1961. He was born in Syria and was lawfully admitted to the United States for permanent residence on October 6, 1966 and had filed a petition for naturalization. He was educated at Louisiana State University, and at the time of this death his permanent residence was Metairie, Louisiana. He was employed by C. F. Bean Corporation (Bean), a company involved in dredging and other operations in all parts of the world. At the time of his death, Bernard was engaged in a temporary assignment for Bean in Beirut, Lebanon. At the time of the airplane crash, Bernard was returning to Lebanon from a business trip to Bean's headquarters in New Orleans. Decedent Odile Mahfoud was a domiciliary of Louisiana, with a permanent residence at Metairie, Louisiana. She was born in Beirut, Lebanon and was married to Bernard on August 28, 1967. She was lawfully admitted to the United States for permanent residence on September 19, 1967, and had made application to file a petition for naturalization. Odile had been employed by the Department of Employment and Security for the State of Louisiana from January 1968 to August 1969 but at the time of her death she was rearing the three children of her marriage. Bean had permitted Odile and her children to accompany Bernard during his temporary assignments in the Middle East, and at the time of her death she was also

accompanying Bernard on his busness trip to the United States.

The three children of the marriage of Bernard and Odile Mahfoud, who are the beneficiaries of this action, were born in Louisiana. At the time of the subject accident, the three children were in Beirut under the temporary care of their maternal grandmother while their parents went to the United States on Bean business. They had traveled to the Middle East on United States passports. Upon the death of both their mother and father, the grandmother has continued caring for the children pending the outcome of this litigation.

Bernard and Odile maintained a permanent home in Metairie, Louisiana, during his station in Beirut, Lebanon for Bean. His payroll check from Bean was deposited into a New Orleans bank account. These facts indicate that Bernard Mahfoud and his wife intended to return to Louisiana at the completion of the then current Bean project in the Middle East and were Louisiana residents.

The plaintiff herein, Robert F. Mahfoud, is the brother of the decedent Bernard F. Mahfoud and has been legally appointed as administrator of the successions of Bernard and Odile Mahfoud, and as legal tutor of his three children by the Twenty-Fourth Judicial Court, Parish of Jefferson, State of Louisiana. The estates of Bernard and Odile Mahfoud have been probated in Louisiana and all assets of the children beneficiaries are in the State of Louisiana.

In contrast, New York's only real contact with the parties is the fact that is was the location of the plane crash. The location of an airplane crash on approach to a scheduled destination can be classified as fortuitous, especially when the crash occurred on the first leg of a trip with Paris as the ultimate destination.

Considering all of the above, we find that Louisiana has the greater interest in having its law applied to damages and that thus Louisiana law is the law which would be applied under New York's conflict of law principles.

We also note that as to Eastern, Louisiana law will also apply on any damage issues.[1] This would be true using New York conflicts of law principles as outlined above. However, this matter was transferred to New York under 28 U.S.C. § 1407 and back to Louisiana under 28 U.S.C. § 1404(a). Using the doctrine that the transferee court would apply the law which the transferror court would have applied, including its conflict of law principles, we would be applying the conflict of law principles of Louisiana. Under *Jagers v. Royal Indemnity Co.*, 276 So.2d 309 (La. 1973), this case actually presents a false conflict of laws question in that, as we have found above, Louisiana is the only state which has a real interest in the application of its law to the damage issue.

For all of these reasons, we hold that Louisiana law is applicable to the determination of damages in this case.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Eastern has moved this court for partial summary judgment seeking to limit its liability to $75,000 per decedent pursuant to the provisions of the Warsaw Convention, as amended by the Montreal Agreement (hereinafter referred to as "the WC/MA"). Actually, plaintiff agrees with Eastern that the WC/MA governs Eastern's liability in this matter. However, plaintiff asserts an

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[1] Louisiana law will govern a determination of the amount of damages even though Eastern's liability for such damages is partially limited by the Warsaw Convention as amended by the Montreal Agreement

entitlement to prejudgment and postjudgment interest over and above the $75,000. Eastern contends that interest, whether in the form of prejudgment interest or postjudgment interest may not be assessed on a WC/MA award, except, possibly to the extent that the interest plus actual proven damages totals no more than a maximum of $75,000.

In responding to plaintiffs' amended complaint on July 30, 1976, Eastern pleaded the limitation of liability of the WC/MA as an affirmative defense to plaintiffs' claims. In September 1978, in the multidistrict litigation, the court granted plaintiffs' oral motion, over Eastern's objections, for the entry of judgment against Eastern on the issue of liability on the basis of WC/MA and orders were signed by the court to that effect. On February 28, 1979, by written motion, plaintiff moved the multidistrict New York court to amend their liability judgment entered against Eastern to permit Eastern to preserve and raise at a later time any defense it had. This motion was granted by order dated May 11, 1979, and incorporated into the court's order of June 1, 1979. Eastern appealed this order and on October 6, 1980 the judgment was reversed by the Second Circuit. See *Windbourne v. Eastern Airlines, Inc.*, 479 F.Supp. 1130 (E.D. N.Y. 1979), *reversed* 632 F.2d 219 (2nd Cir. 1980). Eastern's appeal and the Second Circuit's reversal of the district court were not based on Eastern's denial of the application of the WC/MA to the death of the decedents, but rather on certain deficiencies arising from Eastern's objection to plaintiffs' procedural capacity to prosecute this action. Eastern has now accepted the procedural capacity of plaintiff.[2]

[2] Despite references to a lack of precedural capacity in Eastern Airline's response to a Motion for Summary Judgment filed by U.S.F. & G., all counsel agree that this issue was dropped during the multidistrict litigation in New York.

The Warsaw Convention enacted on October 12, 1929 created a uniform body of law pertaining to the rights and responsibilities of passengers in interntional air carriers. The United States became a party to the convention in 1934. On November 15, 1965, the United States denounced the convention because of its low limit of liability for personal injury or death to passengers (approximately $8300). In May 1968, before the denunciation too effect, a new liability system was agreed upon by the United States and foreign air carriers. The Montreal Agreement, as it was known, increased the limitation of liability limit to $75,000 and created absolute liability of airlines in international travel.

The system of liability kown as the Montreal Agreement consists of a collection of documents. These include (1) an agreement signed by each participating airline in which it consents to file a tariff with the Civil Aeronautics Board, to provide 12 months notice of withdrawal of the tariff, and to provide passengers with notice of a new liability; (2) a tariff in which the airline agrees to forego certain defenses which it could have raised under the terms of the Warsaw Convention and waives the limitations of the Convention's Article 22 liability up to $75,000; (3) a notice, commonly on the airline ticket, advising passengers of the possible application of the Warsaw Convention and the $75,000 liability limitation; and (4) an order of the Civil Aeronautics Board approving the tariff. See Kreindler, Aviation Accident Law § 12A.02 (1981).

Plaintiff cities various references to proven damages and statutes regarding the Montreal Agreement in support of the position that the $75,000 was not intended to include interest.[3] However, these references must be

[3] These references to provable damages are in the notice to passengers agreed upon at Montreal and printed by Eastern on the tickets

considered in light of the fact that although Eastern's maximum liability under the WC/MA is $75,000, a plaintiff must still prove his entitlement to at least that amount of damages. Therefore, we do not take these references to proven damages to mean that the allowance of interest on $75,000 was considered by the parties to the WC/MA, and accepted.

The tariff filed by Eastern pursuant to the Montreal Agreement provides in pertinent part: "The limit of liability for each passenger for death, wounding or other bodily injury should be the sum of U. S. $75,000, inclusive of legal fees and costs." Plaintiff argues, with support from *Leppo v. Transworld Airlines*, No. 21770-1973 (S.Ct. N.Y. City, March 10, 1976), that if the Airlines had intended to include interest they would have specifically set it forth as they did with legal fees and costs. We agree with Eastern that the basis for adding interest cannot be the mere failure of the drafters of the Montreal Agreement and tariff filed pursuant thereto to include such a specific phrase including interest in the $75,000. There is no indication that interest was considered by the drafters and specifically included in or excluded from the $75,000 limitation. However, we do not believe, as defendants suggest, that this totally precludes the imposition of interest in certain cases.

Four federal courts have addressed the issue of interest in a WC/MA personal injury/death claim. All four of these cases arise out of the same Eastern flight on which the plaintiff decedents were killed.

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issued to plaintiff decedents, a Department of State memorandum entitled "United States Government Action Concerning the Warsaw Convention" dates May 5, 1966; and a press release issued by the Civil Aeronautics Board on May 13, 1966.

In *Distenza v. Eastern Airlines, Inc.*, No. 75-2412 (E.D. La. 1982), the court ruled, without stated reasons, that interest should be allowed under the WC/MA.

In *Hickey v. Eastern Airlines, Inc.*, No. 76-237F (E.D. La. 1981), the issue of interest was never finally adjudicated since the matter was settled. However, Judge Mitchell indicated in proceedings prior to settlement that interest should be allowed on the $75,000 in order for the WC/MA's true intent of providing for absolute liability while expediting matters to be fostered.

This dual purpose was also recognized by Judge Collins in *Windbourne v. Eastern Airlines*, No. 75-715C (E.D. La. 1982). The *Windbourne* court reasoned that the Montreal Agreement contemplated prompt recovery to the passenger from the Airline in return for the maximum damage award limitation and that this purpose was frustrated when litigation continued for 6 years after the crash. Judge Collins also noted that [a]n additional equitable consideration militating in favor of such award is that airlines would be unjustly enriched if allowed to interminably litigate the issues and withhold from survivors that to which they are entitled by law." Id.

In *Domangue v. Eastern Airlines, Inc.*, 542 F.Supp. 643 (E.D. La. 1982), Judge Boyle denied prejudgment and postjudgment interest. His reasoning was that the intent of Article 22 of the Warsaw Convention as amended by the Montreal Agreement is to limit recoverable damages to $75,000 and thus fix at a definite level the costs to airlines of damages sustained by the passengers and of insurance to cover their damages.

We agree with the court in *Hickey, supra*, and *Windbourne*, No. 75-715C (E.D. La. 1982). As the New York court in the multidistrict stage of this case remarked:

"While one of the central purposes of the Warsaw Convention was to limit the potential liability of a carrier by providing a maximum damage recovery . . . for personal injury or death arising out of an air disaster, this Argus of the aviation industry was not exacted without a price. In exchange for this protection, Article 17 was included to provide that

> "[T]he carrier shall be liable for damages sustained in the event of the death or wounding of a passenger, if the accident which caused the damage sustained took place on board the aircraft or in the course of any operations of embarking or disembarking."

Windbourne v. Eastern Airlines, Inc., 479 F.Supp. at 1140. The Montreal Agreement changed this liability by raising the Airline's limit to $75,000 while at the same time waiving the Airline's Article 20(1) defense under the Warsaw Convention.[4] As the State Department remarked:

> "Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and *expedited*."

Department of State Press Release No. 110, May 13, 1966, as quoted in Id. at 1141 (emphasis added).

It is unconscionable to let an airline delay litigation to an extend that a smaller amount of money may be in-

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[4] Article 20(1) of the Warsaw Convention provided that an airline could avoid liability thereunder by establishing that the carrier and his agents had taken all necessary measures to avoid the damage or that it was impossible for the carrier or the agent to take such measure. Thus, under the Warsaw Convention one could speak in terms of "a presumption of liability" while under the Montreal Agreement absolute liability is more to point. See *Windbourne v. Eastern Airlines*, 479 F.Supp. at 1141 and the cases cited therein.

vested in order to pay a $75,000 claim. The WC/MA was intended for speedy resolution of claims. The plaintiff here has never contested that the WC/MA applied, and, in fact, moved for summary judgement on that issue. That motion was resisted by Eastern on purely procedural grounds which were later withdrawn. Thus, this case is distinguishable from *Domangue* in which the plaintiff resisted the application of the WC/MA after the Second Circuit's decision at the multidistrict level. While we do not hold that in every single instance interest would be allowable, we do hold that in this case prejudgment and postjudgment interest is allowed. We also hold that prejudgment interest is to be allowed from the date of judicial demand at the rate provided for under the Louisiana Civil Code articles.

For all of these reasons, we find that Eastern is liable to plaintiff up to the amount of $75,000 for each decedent, inclusive of attorney's fees and costs, plus prejudgment and postjudgment interest.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this the 11th day of November, 1982.

UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

February 17, 1978

Mr. Robert L. Alpert
Vice President
U.S. Aviation Underwriters, Inc.
110 William Street
New York, New York 10038

Re: *Eastern Airlines Flight 66, Your No. VL 32407*

Dear Bob:

This will confirm our telephone conversation of this afternoon that Associate Attorney General Michael Egan today approved the Government's participation in the settlement of the Eastern 66 litigation, according to the following terms and conditions, which we had previously discussed:

(1) The United States will contribute 40% to all passenger claims, except those involving government employees, previously settled by Eastern or its insurers, where there are no out-standing claims against the United States.

(2) In cases previously settled by Eastern or its insurers where there are claims outstanding against the United States, the United States will contribute 40% of the total amount, in all cases where the claim against the United States is compromised or adjudicated for an amount less than $25,000.

(3) In cases previously settled by Eastern or its insurers where there are claims outstanding against the United States, if the claim against the United States is compromised or adjudicated for an amount in excess of $25,000, the United States will contribute nothing toward the settlement negotiated by Eastern and will bear its own costs.

(4) The United States will contribute 40% toward the settlement or payment of damage judgment of all other passenger claims, excluding any claims involving government employees.

(5) The United States will contribute 40% of the net insured value of the Boeing 727 aircraft.

(6) The United States will dismiss its pending third-party actions against Eastern and its insurers on account of claims of the crew, and enter into an agreement with Eastern and its insurers to hold them harmless against any claims by the cockpit or cabin crew in excess of their workmen's compensation or other insurance claims.

(7) The contribution of the United States under paragraphs (1), (2), (4), and (5), shall be limited to a total of 12 million dollars, and Eastern and its insurers shall enter into an agreement to hold the United States harmless against any claims in excess of that amount.

This agreement is a fair one, and represents a sound approach to the disposition of complex air carrier litigation. I know that you share my hope that the spirit of mutual cooperation and candor which made it possible will continue, and that we will be able to equitably and expeditiously resolve our difference in future cases.

Very truly yours,

WILLIAM G. SCHAFFER
Deputy Assistant Attorney General

UNITED STATES AVIATION UNDERWRITERS
INCORPORATED

March 1, 1978

William G. Schaffer, Esq.
Deputy Assistant Attorney General
Civil Division
10th & Constitution Avenues, N.W.
Washington, D. C. 20530

EASTERN AIR LINES, INC.
J.F.K. International Airport
Date of Loss: June 24, 1975
USAIG No. VL 32407 - Various

Dear Bill:

My review of your letter of February 17, 1978 reflects that it accurately sets forth most of the essential issues involved in the agreement between the United States and Eastern's insurers with respect to a settlement of the litigation arising out of this accident. However, there were a few additional issues which I believe you and I came to an understanding about and which I think should be set forth preliminarily in a letter prior to my drafting a formal settlement agreement.

It is my understanding that with respect to the passenger claims arising out of this accident, all of which are referred to in paragraphs (1), (2), (3) and (4) of your letter dated Feburary 17, 1978, the United States will reimburse Eastern's insurers for 40% of the funeral expenses, medical expenses, cash advances and related expenses which have been or will be advanced in the interests of controlling litigation and reducing the ultimate settlements or judgments. At the present time, it appears that that amount is approximately $300,000.00.

In addition, the United States will reimburse Eastern's insurers for 40% of all of the costs and expenses (excluding attorneys' fees) involved in any further pretrial discovery, trial or appeal relating to the issues of damages in the unsettled passenger cases referred to in paragraph (4) of your letter.

As a condition precedent to the maximum limit of the contribution on the part of the United States referred to in parapgraph (7) of your letter, Eastern's insurers, through the undersigned, will have complete control over the damage discovery, damage trials, appeals and any decisions relating to the settlement or non-settlement of a particular passenger case.

Lastly, it is my understanding that the Department of Justice will make every reasonable effort to see that Eastern's insurers will be reimbursed within 90 days for the monies referred to in paragraphs (1), (2) and (5) of your letter dated February 17, 1978 and all passenger related expenses and damage related expenses referred to in this letter. It goes without saying that the United States' share of any passenger settlements will be paid directly by it to the individual heirs or next-of-kin and not be funded in any way by Eastern's insurers.

If all of the above accurately reflects our numerous telephone conversations please sign a copy of this letter which is enclosed and return same to my attention. I wish to thank you again for your efforts and cooperation in negotiating this settlement to what I believe is a mutally beneficial result.

Very truly yours,

Robert L. Alpert
RLA:rp

The foregoing accurately reflects our agreement, except that the United States will not reimburse Eastern's insurers for any expenses incurred in cases described in Paragraph (3) of my letter of February 17, 1978, as discussed in our telephone conversation of March 14, 1978.

William G. Schaffer, Esq.
3-22-78

PETITIONER'S

BRIEF

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.,
Petitioner,

v.

ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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* RICHARD M. SHARP
JEFFREY C. MARTIN
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QUESTION PRESENTED

Under the Warsaw Convention as supplemented by the Montreal Agreement, the liability of an air carrier for the death or bodily injury of a passenger in international transportation is limited to $75,000. Despite that express limit of liability, may a court hearing a case subject to those international agreements make an award of prejudgment interest that results in a total award of damages against a carrier that exceeds $75,000?*

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* The parties to the proceeding in the court of appeals were Eastern Air Lines, Inc., Petitioner in this Court; Robert F. Mahfoud, Respondent in this Court; and the United States. This action was brought in the United States District Court for the Western District of Louisiana by Robert F. Mahfoud, as administrator of the successions of Bernard F. Mahfoud and Odile W. Mahfoud and as tutor of minors Paul Bernard Mahfoud, Mireille MaBelle Mahfoud, and Natalie La Rose Mahfoud. The suit named Eastern, the United States, and five other defendants. After judgment was entered against Eastern and the United States, Eastern appealed to the United States Court of Appeals for the Fifth Circuit solely on the question now presented to this Court. The United States appealed other parts of the same judgment, but dismissed its appeal.

Eastern has no parent company, no affiliates, and no subsidiaries that are not wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1807

EASTERN AIR LINES, INC.,
Petitioner,

v.

ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The per curiam opinion and judgment of the court of appeals (J.A. 88) are not officially reported.[1] The opinion and judgment of the district court (J.A. 69, 83) are not officially reported, but the opinion is unofficially reported at 17 Av. Cas. (CCH) 17,714. By order of the Judicial Panel on Multidistrict Litigation, this case was consolidated for pretrial proceedings with other cases arising from the same air disaster. Published opinions relating to the consolidated proceedings and to certain of the consolidated cases are noted in the margin.[2]

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[1] The court of appeals ruled that the question presented was controlled by its earlier decision in *Domangue* v. *Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984).

[2] Published opinions in the consolidated proceedings (*In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*):

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1984. The petition for writ of certiorari was filed on May 4, 1984, and was granted on October 1, 1984. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

The Warsaw Convention provides:[3]

Article 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

• • • •

Article 20

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

• • • •

Article 22

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

The Montreal Agreement supplements Article 22(1) by special contract as follows:[4]

"The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by

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407 F. Supp. 244 (J.P.M.D.L. 1976) (consolidating cases for coordinated pretrial proceedings); 479 F. Supp. 1118 (E.D.N.Y. 1978) (certifying liability issues for appeal and remanding cases to transferor courts for damages trials); 635 F.2d 67 (2d Cir. 1980) (affirming liability judgment on jury verdict against Eastern).

Published opinions relating to the carrier's limit of liability for international passengers: *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219 (2d Cir. 1980), *rev'g* 479 F. Supp. 1130 (E.D.N.Y. 1979) (reversing summary judgment for Warsaw Convention plaintiffs); *Domangue* v. *Eastern Air Lines, Inc.*, 531 F. Supp. 334 (E.D. La. 1981) (granting summary judgment limiting liability of Eastern to $75,000); *Domangue* v. *Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), *rev'g* 542 F. Supp. 643 (E.D. La. 1982) (holding prejudgment and postjudgment interest available in excess of the limit of liability); *O'Rourke* v. *Eastern Air Lines, Inc.*, 16 Av. Cas. (CCH) 18,367 (E.D.N.Y. 1982) (granting summary judgment limiting liability of Eastern to $75,000); *O'Rourke* v. *Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), *aff'g* 553 F. Supp. 226 (E.D.N.Y. 1982) (denying prejudgment interest in excess of the limit of liability).

[3] The full title of the Warsaw Convention is The Convention for Unification of Certain Rules Relating to International Transportation by Air, *done* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note. Under Article 36 of the Convention, the sole official language of the Convention is French. The translation used throughout this brief is that found in the United States Code, and references to the Convention are to the version found there.

[4] The full title of the Montreal Agreement is the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900. The Montreal Agreement was approved by the United States Civil Aeronautics Board, Order No. E-23680, 31 Fed. Reg. 7302 (1966), *reprinted at* 49 U.S.C. app. § 1502 note. The full text of the Agreement is reprinted in the Appendix to this brief.

the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

"(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

"(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol."

STATEMENT

A. Background

On June 24, 1975, Eastern Air Lines Flight 66 from New Orleans to New York City was caught in a windshear and crashed short of a runway at John F. Kennedy International Airport. One hundred thirteen persons perished, including Respondent's decedents Bernard and Odile Mahfoud. See *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 635 F.2d 67, 69 (2d Cir. 1980). The decedents' destination was Paris, and thus their trip from New Orleans to New York was one leg of an international journey subject to the provisions of the Warsaw Convention and the Montreal Agreement. Under the terms of the Warsaw Convention of 1929 as supplemented by the Montreal Agreement of 1966, an

air carrier's liability for an international passenger's death or bodily injury is limited to the sum of $75,000, inclusive of legal fees and costs.

On December 4, 1975, Respondent Robert Mahfoud initiated this action in the United States District Court for the Western District of Louisiana on behalf of the decedents' estates and the decedents' three surviving minor children. J.A. 5. The complaint, as amended, named as defendants Eastern Air Lines; the United States; the administrators of the estates of the captain and the pilot of the aircraft; Boeing Company; the Port Authority of New York and New Jersey; and United States Aviation Underwriters. J.A. 6, 20.[5] Alleging that the accident was caused by the negligence of the carrier and its crew, the negligence of the air traffic controllers and weather bureau, the failure of the airport operator to close the airport, and design defects by the manufacturer, the complaint demanded nine million dollars in damages and costs and interest. J.A. 6-7, 20-22.

In its answer, as amended, Eastern denied that it was negligent and affirmatively defended on the grounds that Respondent lacked capacity to sue; that Respondent's claims might be governed by foreign law, rather than Louisiana law; and that decedents' travel was subject to the Warsaw Convention, as supplemented by the Montreal Agreement. J.A. 24-25. Eastern demanded judgment dismissing the amended complaint or limiting its liability in accordance with, *inter alia*, the Warsaw Convention and the Montreal Agreement. J.A. 25.

B. The Consolidated Proceedings Involving Eastern Flight 66

On February 4, 1976, the Judicial Panel on Multidistrict Litigation transferred thirty-seven pending

[5] The defendants other than Eastern and the United States were dismissed by stipulation on April 29, 1981. J.A. 46.

cases arising from the air crash to the United States District Court for the Eastern District of New York (Bramwell, J.) for consolidated pretrial proceedings. *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 407 F. Supp. 244, 247 (J.P.M.D.L. 1976). The multidistrict litigation eventually grew to ninety-one cases, and, on December 15, 1977, Judge Bramwell ruled that the liability of Eastern and the United States in all passenger cases would be tried in the Eastern District of New York. *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. 1118, 1120 (E.D.N.Y. 1978).

Shortly before trial, the United States consented to the entry of liability judgments against it. J.A. 33. When Eastern appeared for trial on September 18, 1978, five plaintiffs, including Respondent, orally moved for summary judgment against Eastern on the ground that the carrier was absolutely liable under the Warsaw Convention as supplemented by the Montreal Agreement. *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219, 220-21 (2d Cir. 1980); J.A. 104-14.[6] Eastern responded that it had not been given sufficient notice of plaintiffs' motions and that its affirmative defenses, such as lack of capacity, precluded summary judgment. 632 F.2d at 220-21; J.A. 112. The district judge granted the motions for summary judgment from the bench. 632 F.2d at 221; J.A. 113.[7]

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[6] On September 14, 1978, Eastern had filed an offer of judgment in the present case under Fed. R. Civ. P. 68, proposing to pay $150,000, together with costs, in discharge of any liability for the deaths of Bernard and Odile Mahfoud. J.A. 34.

[7] Thirty-six passenger cases that did not involve the Warsaw Convention and Montreal Agreement were tried to the jury on the issue of Eastern's liability. Four cases were settled during trial. The jury found Eastern liable in the balance of the cases. 479 F. Supp. at 1121. The Second Circuit affirmed, with Mansfield, J., dissenting. *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 635 F.2d 67 (2d Cir. 1980).

After issues relating to the appealability of the Warsaw Convention judgments were resolved, the district court on June 1, 1979, certified those judgments for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). 632 F.2d at 221-22. The United States Court of Appeals for the Second Circuit reversed on October 6, 1980, principally because in each case the plaintiff had failed to comply with the notice provisions of Fed. R. Civ. P. 56(c). *Id.* at 223-24. In addition, the court of appeals held that the district court was required to resolve factual disputes relating to capacity to sue in certain cases before entering summary judgment. *Id.* at 224. Finally, the court of appeals noted that Eastern had never denied its liability to decedents under the Warsaw Convention and Montreal Agreement, but only its liability to the plaintiff-representatives. *Id.* at 224. The court "suggest[ed] that on remand plaintiffs in all of these cases make a proper motion to the district court to enter an order accomplishing the removal of Eastern's liability to the *decedents* (as distinguished from the particular plaintiffs) * * *." *Id.* at 225 (emphasis in the original).

C. The Decisions Below

On April 23, 1982, Eastern moved in the United States District Court for the Eastern District of New York for partial summary judgment limiting its liability in the present case to $150,000—$75,000 per decedent—as provided for in the Warsaw Convention as supplemented by the Montreal Agreement. J.A. 57. While that motion was pending, this case was transferred back to the United States District Court for the Western District of Louisiana. J.A. 67. On November 16, 1982, the United States District Court for the Western District of Louisiana entered pretrial rulings that Louisiana law governed the determination of the damages Respondent could recover from the United States and Eastern, and that Eastern's liability was limited to $75,000 per dece-

dent pursuant to the Warsaw Convention as supplemented by the Montreal Agreement. J.A. 69.

The district court also concluded, however, that Respondent was entitled to recover prejudgment and postjudgment interest from Eastern over and above the $75,000 limit on liability, at the rate established by the Louisiana Civil Code. J.A. 79. The district court reasoned that the Montreal Agreement "contemplated prompt recovery" from an air carrier by a passenger or passenger's estate and that "[i]t is unconscionable to let an airline delay litigation to an extent that a smaller amount of money may be invested in order to pay a $75,000 claim." J.A. 77-78. Accordingly, the district court held that prejudgment and postjudgment interest would be allowed in this case because Respondent had never contested the application of the limit of liability, and because Eastern had opposed Respondent's motion for summary judgment on that issue in the District Court for the Eastern District of New York "on purely procedural grounds." J.A. 79.[8]

On December 2, 1982, Eastern deposited $150,000 into the registry of the district court for payment of its maximum possible liability for the deaths of Bernard and Odile Mahfoud. J.A. 81. Respondent's damage claims were tried thereafter, with Respondent and the United States presenting evidence, and the district court entered findings on April 5, 1983. R. 1120. On April 21, 1983, the district court entered judgment against the United States and Eastern and in favor of Respondent, on behalf of decedents' minor children, in a total amount of approximately $1.7 million, exclusive of interest. J.A.

[8] As noted above, Eastern's opposition to Respondent's motion for summary judgment was sustained by the Second Circuit. See p. 7, *supra*. The later order of the United States District Court for the Western District of Louisiana granting summary judgment on the issue of limitation of liability was made on Eastern's motion. J.A. 73.

84. Eastern was adjudged liable for the principal amount of $150,000 and for prejudgment interest on that amount from December 4, 1975, the date the complaint was filed, to December 2, 1982, the date that $150,000 was deposited by Eastern with the court. The prejudgment interest amounted to approximately $87,000. Since Eastern had deposited the principal amount prior to trial, no award of postjudgment interest was made against Eastern. The United States was adjudged liable for the balance of the principal damage award above $150,000 and for postjudgment interest pursuant to 28 U.S.C. § 1961. J.A. 84-85.

Eastern appealed the judgment of the district court to the United States Court of Appeals for the Fifth Circuit solely on the ground that the award of prejudgment interest in excess of the $75,000 limit of liability contravened the Warsaw Convention as supplemented by the Montreal Agreement. While this appeal was pending, the Fifth Circuit held in *Domangue* v. *Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), that both prejudgment and postjudgment interest might be awarded over and above the $75,000 limit of liability. Citing *Domangue*, the Fifth Circuit affirmed the judgment of the district court on March 8, 1984, in a brief per curiam opinion. J.A. 88.

The decision below thus rests entirely on the Fifth Circuit's prior decision in *Domangue*, another case arising from the crash of Flight 66. The *Domangue* court based its ruling, in large part, on its view of the objectives embodied in the Warsaw Convention and the Montreal Agreement. It found that the "dominant objective" of the Warsaw Convention of 1929 was "to permit the growth of an infant [aviation] industry by setting limits of liability." 722 F.2d at 261. The court concluded that the Montreal Agreement of 1966, which raised the carrier's limit of liability from approximately $8,300 (125,000 gold francs) to $75,000, embodied two United States objectives. The first objective was to in-

crease the limit of liability and this was achieved "by the increase in liability to a maximum of $75,000.00." *Id.* "[A]n important additional American objective * * * was to encourage the speedy disposition of claims," and this was accomplished by eliminating the carriers' major defense to liability for damages to passengers. *Id.* Having identified these objectives, the court of appeals then sought to "balance" the objective of "maintaining a fixed and definite level of liability" against the objectives of "speedy compensation" and "maximum recovery" for injured parties or their survivors. *Id.* at 262.

The court of appeals struck the balance in favor of allowing the payment of postjudgment interest "above and beyond the $75,000.00 limit to liability established by the Montreal Agreement." *Id.*[9] The court said that awards of postjudgment interest would "encourag[e] the payment of judgments when the victim or his survivors most need help," and that the air carriers would still be provided with "a definite basis for determining their liability," by reference to legal rates of interest or through payment of the principal amount into the registry of the court or an escrow account. *Id.* Moreover, in the court's view, since the Montreal Agreement expressly provides for the inclusion of legal fees and costs in the $75,000 limit, the failure of the drafters of the Agreement to specifically include interest in the limit suggests that "it is proper to award post-judgment interest in a Warsaw/Montreal case." *Id.*

Prejudgment interest, the court held, warranted the same treatment. Although the common law did not permit awards of prejudgment interest on unliquidated tort

[9] The permissibility of an award of postjudgment interest in excess of the limit of liability is not before this Court, since postjudgment interest was not awarded against Eastern in the present case. The Fifth Circuit's ruling in *Domangue* regarding the availability of prejudgment interest, however, draws upon its discussion of postjudgment interest.

claims, the court stated that the Warsaw Convention and the Montreal Agreement were intended to supplant each member nation's varied laws. *Id.*[10] Because it concluded that "allowing victims a more adequate recovery and ensuring speedy disposition of claims were important objectives leading to the modification of the Warsaw Convention by the Montreal Agreement," the court held that "awarding prejudgment interest is permissible under the Warsaw/Montreal body of law and is within the discretion of the court." *Id.* at 263. The court also remarked that it was "influenced by the inequity of Eastern Airlines benefiting from the length of time between the crash and a final judgment * * *." *Id.* at 264.[11]

[10] Although the court of appeals stated that it was not bound by any member nation's law, it based its ruling on the observation that some American courts award prejudgment interest on unliquidated claims "when justice and fairness so require, even though the claim is unliquidated." 722 F.2d at 262-63. It primarily cited decisions granting prejudgment interest in cases arising under various federal statutes, *id.* at 263; none of the cited decisions, however, involved a limitation of liability.

[11] Again applying *Domangue*, the Fifth Circuit recently affirmed an award of interest in excess of the $75,000 limit of liability for passengers in *Winbourne* v. *Eastern Air Lines*, No. 83-3109 (5th Cir., Aug. 9, 1984), *petition for cert. filed*, No. 84-750 (U.S., Nov. 7, 1984). The Fifth Circuit has also affirmed an award of prejudgment interest in excess of the carrier's limit of liability for checked baggage and goods under Article 22(2) of the Warsaw Convention. *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456, 460 (5th Cir. 1984).

Shortly after the Fifth Circuit announced its opinion in *Domangue*, the United States Court of Appeals for the Second Circuit decided *O'Rourke* v. *Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), holding that prejudgment interest may not be awarded in excess of the $75,000 limit of liability of the Warsaw Convention as supplemented by the Montreal Agreement. *Id.* at 851-53.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the limit of liability established by the Warsaw Convention, as supplemented by the Montreal Agreement, may be exceeded by adding thereto an award of prejudgment interest. The Warsaw Convention of 1929 is an international air carriage treaty adhered to by more than 120 nations, including the United States. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 80 L. Ed. 2d 273, 278 (1984). Among other things, the Convention limits an air carrier's liability for the death or injury of a passenger in international transportation to 125,000 gold francs, unless by "special contract" the carrier and passenger agree to a higher limit of liability. The Montreal Agreement of 1966 is an agreement among international air carriers, secured at the instance of the United States Government and approved by the Civil Aeronautics Board, providing that the carriers would undertake by "special contract" with passengers to increase the Warsaw Convention liability limit for all international transportation that includes a point in the United States as a point of origin, destination, or agreed stopping place. The limit established by the Montreal Agreement is $75,000 inclusive of legal fees and costs, or $58,000 exclusive of legal fees and costs in nations where courts separately award fees and costs to prevailing parties.

1. (a) The plain language of the Warsaw Convention and the Montreal Agreement establishes that a court may not award prejudgment interest in excess of the limitation of liability fixed by those agreements. Article 22(1) of the Warsaw Convention provides that the "liability of the carrier for each passenger shall be limited to the sum of 125,000 francs," which was the equivalent of approximately $8,300 in 1934, the year the United States adhered to the Convention. That limit was raised by the Montreal Agreement, which supplemented Article 22(1) by providing that "[t]he limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs." Thus, both provisions, which must be read together, expressly limit the "liability" of the carrier for each passenger to a stated sum certain by fixing the precise maximum amount that a carrier may be required to pay. Their language admits of no exception, and the limit therefore applies to all components of a carrier's total liability, including any liability for prejudgment interest.

This conclusion is buttressed by the further language of the Montreal Agreement providing that in nations that make separate awards of legal fees and costs, "the limit shall be the sum of US $58,000 exclusive of legal fees and costs." The Montreal Agreement thus establishes dual limits of liability in order to equalize in a rough way the maximum compensation that may be received by plaintiffs notwithstanding different national practices with respect to fees and costs. In nations where legal fees and costs are routinely awarded to prevailing litigants, the limit on a carrier's liability is $58,000, with one and only one exception—costs and fees may be awarded above that $58,000 limit. In contrast, in nations such as the United States, where fees and costs are not routinely awarded to prevailing litigants, even that one exception is inapplicable—the limit is $75,000, without exception, thus foreclosing an award of prejudgment interest in excess of that limit. In any event, the dual limits of liability clearly encompass all compensatory damages, and prejudgment interest is an element of such damages.

(b) The all-inclusive nature of the $75,000 liability limit is further shown by the periodical payments provision of the Warsaw Convention. This provision states that where the law of the forum permits an award of damages to take the form of periodical payments, "the equivalent capital value of the said payments shall not exceed 125,000 francs," the limitation of liability established by the Convention. In other words, a carrier may

be required to make periodical payments totaling more than 125,000 francs over time provided that the present value of those payments does not exceed 125,000 francs. This provision reaffirms that the Convention's basic liability limitation is absolute; without such a modification, a carrier's liability even for a series of future periodical payments would be limited to the aggregate payout of 125,000 francs. Moreover, the periodical payments provision is the only provision of the Convention that adjusts the limit of liability to take into account the time value of money, and it in no way authorizes an award of prejudgment interest in excess of the strict limit.

(c) The Warsaw Convention expressly provides that the liability limit may be broken only where the carrier has failed to deliver a ticket to the passenger or where the accident was caused by the "wilful misconduct" of the carrier. The existence of these narrowly drawn exceptions to the liability limit demonstrates that no other was intended.

(d) The language of the Warsaw Convention and the Montreal Agreement precludes the argument, which was effectively accepted by the courts below, that the limitation of liability is a limitation only as of the date of "judicial demand" (*i.e.*, the date the suit was filed), and that accordingly prejudgment interest may be awarded over and above that limit from that date forward without violating those international agreements. This construction ignores the fact that the limitation of liability is just that, not a guarantee of recovery; the plaintiff's damages must be proven before the carrier is liable for any payment whatsoever. Furthermore, acceptance of the lower courts' ruling would render the limitation of liability fluid and uncertain, in contravention of the fixed limit established in mandatory terms by the Warsaw Convention and the Montreal Agreement.

2. (a) The history of the Warsaw Convention confirms that the intent of the signatories was to limit an

air carrier's liability to a fixed and definite sum. The delegates to the 1929 international conference at Warsaw sought to create a uniform system governing an air carrier's liability for damages to passengers and cargo. In pursuit of this goal, the delegates first agreed that carriers should be prohibited from disclaiming liability through contractual exoneration clauses and that the carriers should be presumed to be liable. Accordingly, Article 17 of the Warsaw Convention provides that "[t]he carrier shall be liable for damage" sustained by a passenger unless it proves, pursuant to Article 20(1), that it took "all necessary measures to avoid the damage or that it was impossible" to do so. Second, the delegates agreed that the liability so created should be strictly and specifically limited to 125,000 francs, to ensure that the carrier could measure the risk that it assumed. The delegates made clear that this limit could be broken only in certain exceptional circumstances, and that otherwise the carrier's liability would be absolutely limited to 125,000 francs, unless the carrier and passenger agree by "special contract" to a higher limit of liability.

(b) The origins of the Montreal Agreement demonstrate that its purpose was to increase the fixed limit of liability prescribed by the Warsaw Convention, but not to alter the all-inclusive nature of that limit. The Agreement obligates the signatory carriers to make "special contract[s]" with their passengers providing for a liability limit of $75,000 inclusive of legal fees and costs, or $58,000 exclusive of fees and costs; the Agreement also obligates the carrier to waive its Article 20(1) defense of lack of fault, thus resulting in virtually absolute liability. At the Montreal Conference that preceded the Montreal Agreement, the $75,000 limit was considered by all as establishing an absolute ceiling on a carrier's liability. Further, the United States' willingness to recede from its prior insistence on a limit of $100,000, and to accept a limit of $75,000 combined with the carriers'

waiver of their Article 20(1) defense, reflects an understanding of that limit that precludes an award of prejudgment interest over and above that limit. In the United States' view, a damages award of $75,000, promptly recovered because the carrier is absolutely liable, was roughly equivalent to a damages award of $100,000, recovered after the lengthy litigation of issues of fault. As the chairman of the United States delegation has explained, the $75,000 limit with absolute liability was considered comparable to a $100,000 limit with retention of the carrier's Article 20(1) defense on the theory that "litigation and delay seriously impair the value of the compensation eventually awarded." This view necessarily assumed that a $100,000 award could not be increased by prejudgment interest to compensate for relative delay in its recovery.

3. The decisions of this Court establish that the clear language of a treaty controls its interpretation, unless the literal application of the treaty language effects a result inconsistent with the intent of the treaty's drafters. The language of the Warsaw Convention and the Montreal Agreement, and the purposes of those international agreements, establish that prejudgment interest may not be awarded over and above the carrier's limit of liability. The courts below misperceived their function when they brought equitable considerations to bear on the interpretation of the Warsaw Convention and the Montreal Agreement; those courts were not empowered to balance their view of the equities against the plain language and recognized objectives of those international agreements.

ARGUMENT

Under the Warsaw Convention as supplemented by the Montreal Agreement, the liability of an air carrier for the death of an international passenger is limited to the fixed sum of $75,000, inclusive of fees and costs. The court below held, however, that prejudgment interest may be awarded over and above that $75,000 limit. We show in Part I of this brief that the decision below is contrary to the plain language of the Warsaw Convention and the Montreal Agreement. In Part II, we demonstrate that the decision below also contravenes the intent of the drafters of those international agreements. Finally, in Part III, we urge that, under well-established principles of treaty interpretation, the language and purposes of the Warsaw Convention and the Montreal Agreement cannot be overridden by the equitable considerations relied on by the courts below.

I. THE PLAIN LANGUAGE OF THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT PRECLUDES AN AWARD OF PREJUDGMENT INTEREST OVER AND ABOVE THE CARRIER'S LIMIT OF LIABILITY.

Analysis of the question presented here must begin with the language of the Warsaw Convention and the supplemental Montreal Agreement. As this Court has long recognized, "treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca* v. *Thompson*, 223 U.S. 317, 331-32 (1912). Moreover, in an international agreement, "words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."

De Geofroy v. *Riggs*, 133 U.S. 258, 271 (1890). For these reasons, "the clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982) (quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963)). As demonstrated below, the plain language of the Warsaw Convention and the Montreal Agreement precludes an award of prejudgment interest over and above the limit of liability.

A. The Warsaw Convention as Supplemented by the Montreal Agreement Limits the Carrier's Liability to a Fixed Sum.

Article 22(1) of the Warsaw Convention states:

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

The meaning of the first sentence of this provision could scarcely be clearer: the "liability" of the carrier for each passenger is limited to a fixed sum of 125,000 francs.[12] The focus of the Article is exclusively on the maximum amount that the carrier may be required to

[12] Article 22(4) specifies that this sum refers to "the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths." The sum of 125,000 such gold francs was approximately equivalent to $8,300 in 1934. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967).

pay. That amount is precisely fixed. An award of prejudgment interest in excess of the stated limit impermissibly increases the carrier's liability for the passenger above the prescribed sum certain.

The relevant language of the Montreal Agreement states:

> "The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs."

Like Article 22(1) of the Warsaw Convention, which it supplements, the Montreal Agreement limits the "liability" of the carrier for each passenger to a sum certain. It fixes $75,000 as the carrier's maximum liability per passenger, and the $75,000 limit is stated in language that admits of no exception. The limit thus applies to all components of a carrier's total liability, including any liability for prejudgment interest.

The limitation of liability language of the Montreal Agreement departs from that of the Warsaw Convention, however, in establishing a "split-level" limit of liability depending upon the forum nation's laws regarding attorneys' fees and costs. It provides for a $58,000 limit exclusive of legal fees and costs to apply in nations that make separate awards of fees and costs to prevailing parties, and for a $75,000 limit inclusive of fees and costs to apply in nations such as the United States. Contrary to the reasoning adopted by the court below, this dual limit of liability fully supports the conclusion that prejudgment interest may not be awarded in excess of the prescribed limit.[13]

[13] The Fifth and Second Circuits drew contradictory inferences from the dual limit provisions of the Montreal Agreement. In *Domangue*, *supra*, the Fifth Circuit reasoned that since the $75,000 limit expressly includes legal fees and costs and makes no reference

The Montreal Agreement's dual limit of liability is designed to equalize in a rough way the maximum compensation that may actually be received by passengers or their estates under different legal systems. The Montreal Agreement's dual limits envision two and only two types of liability that might be imposed on a carrier: damages and litigation expenses. All signatory nations to the Warsaw Convention have always understood that the limit on the carrier's liability for each passenger encompasses all the damages that may be awarded the plaintiff.[14] With regard to attorneys' fees and costs, however, different national practices engendered different applications of the Warsaw Convention limit on liability for

to interest, the limit must not include interest. 722 F.2d at 262. In *O'Rourke*, *supra*, the Second Circuit reasoned to the contrary that since the $58,000 limit expressly excludes legal fees and costs, the drafters would have specifically excluded prejudgment interest if they had wished to make any exceptions to the damage limitation figures. 730 F.2d at 853. As we show in text, the Second Circuit drew the correct inference.

[14] Article 24 of the Warsaw Convention states that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Article 24(1). With regard to personal injury and wrongful death actions, that Article leaves open the questions only of "who are the persons who have the right to bring suit and what are their respective rights." Article 24(2); see p. 32 & n.28, *infra*. But the Article makes clear that whatever "rights" a party may have to damages under local law, the amount of damages recoverable is "subject to the conditions and limits" set out in the Convention. Thus, the kinds of provable damages that may be sought and recovered under the Convention and Agreement are left to the applicable local law, but they are all subject to the limit of liability. See H. Drion, *Limitation of Liabilities in International Air Law* 126 (1954) (noting that "[t]he criteria for determining the categories of recoverable damages [under the Warsaw Convention] and the measure of damages vary greatly from country to country," and citing examples). Professor Drion expressly considers whether awards of interest are included within the carrier's limit of liability under Article 22 of the Warsaw Convention, and concludes that they should be, citing Article 24, and disapproving of a Belgian ruling to the contrary. *Id.* at 113-14.

each passenger. In many nations, a losing party routinely pays the prevailing party's "costs," including attorneys' fees. In those nations, responsibility for litigation costs is considered to be independent of liability for the passenger and thus independent of the limit on liability. But in the United States, pursuant to the "American rule" on attorneys' fees, prevailing parties ordinarily pay their own legal fees and costs.[15] Plaintiffs in a Warsaw Convention case brought in the United States thus generally pay their attorneys' fees out of any damages award they receive. Therefore, in the United States, the Warsaw Convention limit on liability for each passenger has been considered inclusive of legal fees and costs. See pp. 34-36, 38-39, *infra*. The Montreal Agreement establishes dual limits to reconcile these different systems.

The dual limit scheme embodied in the Montreal Agreement confirms that the $75,000 limit applicable to the present case is all-inclusive. In nations where legal fees and costs are awarded separately, the limit on a carrier's liability is $58,000, with one and only one exception—costs and fees may be awarded above that limit. In contrast, in nations such as the United States, where fees and costs are not separately awarded, even that one exception is inapplicable—the limit is $75,000, without exception. Thus, the scheme of the Montreal Agreement completely forecloses the possibility that prejudgment interest, or any other item, could be awarded in excess of the $75,000 limit.

In any event, the dual limits of liability clearly encompass compensatory damages. Unlike legal fees and costs, prejudgment interest is an element of compensatory damages awarded to make the plaintiff whole in

[15] The "American rule" is that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975).

light of the lapse of time between the accident or filing of suit and the entry of judgment. *E.g.*, *National Airlines, Inc.* v. *Stiles*, 268 F.2d 400, 405 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959) (prejudgment interest is part of "full value of [plaintiff's] pecuniary loss" within meaning of Death on the High Seas Act); *Bond* v. *City of Huntington*, 276 S.E.2d 539, 548 (W. Va. 1981) (prejudgment interest is "compensation for pecuniary loss" as result of wrongful death); see also, *e.g.*, *General Motors Corp.* v. *Devex Corp.*, 76 L.Ed.2d 211, 217-18 & n.10 (1983) (prejudgment interest is compensation for delay); *Miller* v. *Robertson*, 266 U.S. 243, 258 (1924) (same); Comment, *Interest on Judgments in the Federal Courts*, 64 Yale L. J. 1019, 1019 (1955) (prejudgment interest is "interest *qua* damages").[16] Compare *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923) (interest from date of taking to date of payment is an element of "just compensation" for purposes of the Fifth Amendment) with *United States* v. *Bodcaw Co.*, 440 U.S. 202 (1979) (property owner's litigation costs are not part of "just compensation"). As a constituent of the plaintiff's compensation, prejudgment interest is necessarily part of the carrier's "liability" for the passenger and is thus included within the $75,000 liability limit.[17]

[16] At common law prejudgment interest could not be awarded on unliquidated tort claims, and some states adhere to this principle in wrongful death actions. See, *e.g.*, *Berns* v. *Pan American World Airways, Inc.*, 667 F.2d 826, 830 (9th Cir. 1982) (applying California law); *Schneider* v. *Lockheed Aircraft Corp.*, 658 F.2d 835, 855 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982) (applying District of Columbia law); *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 633, 637-41 (7th Cir. 1981) (applying Illinois law). See generally 1 S. Speiser, *Recovery for Wrongful Death* § 8.6 & n.48 (2d ed. 1975). Under Louisiana law, however, the law applicable to Respondent's claims, defendants in personal injury cases are liable for prejudgment interest even though the claim is unliquidated as of the date of suit. La. Rev. Stat. Ann. § 13:4203. See *Steele* v. *St. Paul Fire & Marine Ins. Co.*, 371 So.2d 843, 852-53 (La. Ct. App.), *cert. denied*, 374 So.2d 658 (La. 1959); *Davis* v. *LeBlanc*, 149 So.2d 252, 253-54 (La. Ct. App. 1963). The court of appeals erred in *Domangue*, *supra*, when it suggested otherwise. See 722 F.2d at 262.

B. The Periodical Payments Provision of the Warsaw Convention Confirms That the Limit of Liability Is All-Inclusive.

After limiting the carrier's liability to the fixed sum of 125,000 francs, Article 22(1) of the Convention goes on to provide in a second sentence that where the law of the forum permits an award of damages to take the form of periodical payments, such as is the case in Germany, *e.g.*, Burgerliches Gesetzbuch § 845 (W. Ger.), *reprinted* in 2 S. Speiser, *Recovery for Wrongful Death*, 830 app. B (2d ed. 1975), "the equivalent capital value of the said payments shall not exceed 125,000 francs." See p. 18, *supra*. The provision is instructive in two respects. First, it recognizes that an express modification of the first sentence's unambiguous limitation of a carrier's maximum liability to 125,000 francs was necessary to place countries where damages are awarded in the form of future periodical payments on the same

[17] In the United States, liability for personal injury is sometimes limited by statute or contract, and courts that have considered the question have held that prejudgment interest must be included in the established liability limit. See *Maynard* v. *Eastern Air Lines, Inc.*, 178 F.2d 139, 141 (2d Cir. 1949) (Connecticut wrongful death statute limiting recovery to $20,000 prevented allowance of prejudgment interest on $20,000 judgment); *Houser* v. *Eckhardt*, 35 Colo. App. 155, 532 P.2d 54, 56-57 (1974) (insurance policy limit of liability for personal injury damages includes liability for prejudgment interest, which "is in the nature of another item of damages"); *Welsh* v. *Peerless Casualty Co.*, 8 A.D.2d 373, 187 N.Y.S. 2d 842 (1959), *aff'd mem.*, 8 N.Y.2d 745, 168 N.E.2d 99, 201 N.Y.S.2d 760 (1960) (same). See also *United States* v. *Intercontinental Industries, Inc.*, 635 F.2d 1215, 1222 (6th Cir. 1980) (statutory limitation of liability for unpaid taxes includes prejudgment interest); *United States* v. *Metro Constr. Co.*, 602 F.2d 879 (9th Cir. 1979) (same).

footing as other countries. In the absence of the second sentence, a carrier's maximum liability for periodical payments would be limited to a total payout of 125,000 francs, even though the present value of a series of periodical payments over time totaling 125,000 francs is less than the value of a lump sum payment of 125,000 francs today. Second, this provision is the only one in the Convention that adjusts the limit of liability to take into account the time value of money, and it in no way authorizes an award of prejudgment interest in excess of that strict limit.

C. The Explicit Exceptions to the Limit of Liability Demonstrate That the Limit is Otherwise Absolute.

The Warsaw Convention provides that, unless the carrier and passenger agree to a higher limit,[18] the limit of liability established therein may be exceeded only under two circumstances. First, under Article 3(2), the carrier cannot rely on the limitation of liability if it accepts a passenger without having delivered to him or her the ticket required by the Convention. Second, under Article 25, a carrier is not entitled "to avail himself of the provisions of this Convention which exclude or limit his liability" if the damage was caused by the "wilful misconduct" of the carrier.[19] The fact that the text of the

[18] Article 22(1) provides that the carrier and the passenger may agree by "special contract" to a higher limit.

[19] During the 1971 Guatemala City Conference to revise the Warsaw Convention, proposals were made to abolish the "wilful misconduct" exception because it encouraged unnecessary litigation and delay. The Italian delegate, however, pointed out that a more narrowly drawn "wilful misconduct" exception would reduce litigation and reinforce the absolute nature of the limit on liability:

> "[A] provision permitting the limit to be broken [in the case of an accident resulting from the carrier's deliberate act] would only marginally detract from the principle of unbreakability and would have the great advantage of offering a standing rule of interpretation of that principle. In other words, it could be assumed that if this was the only exception to the applicability of the limits in Article 22 recognized by the Convention, no other could be made by national courts." International Civil Aviation Organization, *Minutes of International Conference on Air Law, Guatemala City, Feb.-Mar. 1971*, at 135.

That conference ultimately decided to eliminate the wilful misconduct exception for reasons unrelated to the argument made by the Italian delegate. See n. 37, *infra*.

Convention specifies that the liability limit may be exceeded only in these two narrow circumstances confirms that the limitation is absolute in all other cases. As this Court has long held, there is "no rule of interpretation applicable to treaties • • • which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them." *Society for the Propagation of the Gospel* v. *New Haven*, 21 U.S. (8 Wheat.) 464, 490 (1823).

D. The Decision Below Embraces An Unsupportable Reading of the Texts of the Warsaw Convention and the Montreal Agreement.

The decision of the district court, affirmed by the court of appeals, held that the $75,000 limit of liability is not offended by awarding prejudgment interest, calculated from the date of "judicial demand," over and above that limit. J.A. 79, 84. In other words, the courts held that the carrier's liability is limited to $75,000 only if it pays that amount on the date the complaint is filed. This ruling, however, rests on a fundamentally flawed reading of the text of the Convention and Agreement.

First, the Warsaw Convention, as supplemented by the Montreal Agreement, places a fixed $75,000 limit on the carrier's total liability, including liability for costs and fees. See pp. 18-23, *supra*. Reading the agreements instead to impose only a $75,000 limit on the carrier's liability as of the date of suit is flatly contrary to the language of those agreements.

Second, the lower courts' interpretation of the limit of liability renders that limit "fluid" and "uncertain," contrary to the mandatory language of the agreements and the manifest purpose of their framers to set a fixed limit. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 80 L. Ed. 2d 273, 286 (1984); pp. 28-43, *infra*. Under the decision below, the carrier's actual limit of liability increases with the passage of time between the date of suit and the date of judgment. The limit would also vary because different jurisdictions prescribe different rates of prejudgment interest,[20] and because some jurisdictions do not allow prejudgment interest at all, see n.16, *supra*. Moreover, in some jurisdictions prejudgment interest runs from the date of injury rather than from the date of suit. See, *e.g.*, N.Y. Est. Powers & Trusts Law § 5-4.3(a).

Finally, the lower court's interpretation of the limit means that the only way the carrier can limit its financial liability to $75,000 is to pay the stated maximum on the date of "judicial demand." This reading ignores the fact that under Article 17 of the Convention the carrier is liable only for "damage sustained in the event of the death or wounding of a passenger," and that such damage must be proven in court or agreed to by the parties. *E.g.*, *Windbourne* v. *Eastern Air Lines, Inc.*, 479 F. Supp. 1130, 1141 (E.D.N.Y. 1979), *rev'd on other grounds*, 632 F.2d 219 (2d Cir. 1980).[21] The limit of lia-

[20] The district court in the present case applied three different rates of prejudgment interest to different time periods. J.A. 84-85.

[21] For example, the Minutes of the 1955 Hague Conference on the Warsaw Convention reflect that the Australian delegate emphasized the necessity of proving damages. In commenting on a proposal by the United States to increase the Warsaw limit to approximately $16,600, the Australian delegate said:

> "Under [the proposed Warsaw/Hague] limit, it was still essential that a person making a claim for the full amount permitted under the Convention establish that he had in fact suffered damage at least equal to that amount. So that in many countries of the world where much lower awards were normally applicable for death and personal injury, and that included his own, there would be little likelihood of that limit actually being paid." International Civil Aviation Organization, *Minutes of International Conference on Private Air Law, The Hague, Sept. 1955*, at 273 [hereinafter "Hague Minutes"].

bility established by the Warsaw Convention and the Montreal Agreement is only a limit, not a guarantee of minimum recovery.[22] It is inconsistent with this principle to hold that a carrier must pay all unliquidated claims relating to international passengers on the date of judicial demand in order for its liability to be limited to the specific sum stated in those agreements.

II. AN AWARD OF PREJUDGMENT INTEREST OVER AND ABOVE THE CARRIER'S LIMIT OF LIABILITY IS INCONSISTENT WITH THE PURPOSES OF THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT.

The ruling below is contrary not only to the plain language of the Warsaw Convention and the Montreal Agreement, but also to the underlying objectives that the drafters of those agreements sought to accomplish. As this Court has held, the words of a treaty must be given their obvious meaning unless the result of doing so is "inconsistent with the intent or expectations of its signatories." *Maximov* v. *United States*, *supra*, 373 U.S. at 54 (1963); *accord*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, *supra*, 457 U.S. at 180. In this section, we show that the history of the Warsaw Convention and the Montreal Agreement confirms what the language of those agreements plainly states: the intent of the signatories was to limit an air carrier's liability to a fixed and definite sum.

[22] The Montreal Agreement does not modify the Convention's requirement that the amount of recoverable damages must be established or stipulated. The notice required by the Agreement describes liability for "proven damages" as being limited to $75,000 per passenger. Montreal Agreement, ¶ 2. See p. A-3, *infra*.

A. The Creation of a Fixed Limit of Liability Was an Integral Part of the Uniform System of Liability Established by the Warsaw Convention.

The delegates to the Second International Conference on Private Aeronautical Law held in Warsaw, Poland, in 1929, sought to create a uniform system of rules governing certain aspects of international aviation. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967) [hereinafter "Lowenfeld"].[23] In particular, the delegates had as their goal the creation of uniform rules governing the circumstances under which an international air carrier would be liable for damages suffered by its passengers or cargo. See *Minutes of the Second International Conference on Private Aeronautical Law, Warsaw, 1929*, at

[23] The first International Conference on Private Aeronautical Law met in Paris, France, in 1925. See *Minutes of the Second International Conference on Private Aeronautical Law, Warsaw, 1929*, at 11 (R. Horner & D. Legrez trans. 1975) [hereinafter "Warsaw Minutes"]. The Paris Conference produced the draft of a convention to regulate the liability of air carriers engaged in international carriage, and created a committee of legal experts on aviation to study that draft. Warsaw Minutes, *supra*, at 241-42; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498 (1967). The committee of experts, known as the Comité International Technique d'Experts Juridique Aériens ("CITEJA"), met on several occasions in the following years, and in 1928 produced a draft convention that set forth a uniform set of rules relating both to the documents of air carriage and to the liability of the air carrier. Warsaw Minutes, *supra*, at 245-46. In 1929, the Second International Conference was convened in Warsaw to consider the CITEJA draft. *Id.* at 11-14. Delegates from more than 25 nations attended the Warsaw Conference. *Id.* at 5-10. While the United States participated in the Warsaw Conference only as an observer, *id.* at 10, the Senate approved the Convention by voice vote on June 15, 1934, 78 Cong. Rec. 11,582 (1934). The President proclaimed the Convention for the United States on October 29, 1934. 49 Stat. 3000-13.

11-12, 20, 26-37 (R. Horner & D. Legrez trans. 1975) [hereinafter "Warsaw Minutes"].[24]

In pursuit of uniformity, the delegates reached certain decisions that conferred considerable benefits on air travellers. Most significantly, the delegates agreed that air carriers should be prohibited from disclaiming liability on the basis of exoneration clauses inserted in their contracts of carriage; after rejecting an amendment proposed by Japan that would have permitted such exoneration clauses if authorized by a nation's laws, Warsaw Minutes, *supra*, at 34-36, the delegates adopted Article 23 of the Warsaw Convention, which provides that "[a]ny provision tending to relieve the carrier of liability * * * shall be null and void * * *."[25] In addi-

[24] See *Reed* v. *Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) (one "fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved.") (footnotes omitted).

In addition to these uniform liability rules, the delegates established a uniform system of documentation for passenger tickets, baggage checks, and air waybills. See Warsaw Convention, Chapter II.

[25] The comments of the delegate from Great Britain on the proposed Japanese amendment illustrate the importance that the delegates placed on the creation of a uniform system of liability:

> "As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity. If the conference adopts the point of view of Japan, we miss the point. The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity." Warsaw Minutes, *supra*, at 35-36 (comments of Sir Alfred Dennis (Great Britain)).

The importance of establishing uniform rules governing international air carriage was stressed by the delegates throughout the

tion, the delegates agreed that a presumption of liability should be placed on the carrier; the Warsaw Convention therefore provides that "[t]he carrier *shall be liable* for damage" sustained by a passenger unless it proves that it took "all necessary measures to avoid the damage or that it was impossible for [the carrier] or [its agents] to take such measures." Warsaw Convention, Articles 17 & 20 (emphasis added).[36]

In establishing a uniform system, the Convention's framers also enacted a strict and specific limitation on the air carrier's liability. See Lowenfeld, *supra*, 80 Harv. L. Rev. at 499-500. M. De Vos, the Reporter of the draft that formed the basis for the final Warsaw Convention, explained the close relationship between the

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Conference. See, *e.g.*, Warsaw Minutes, *supra*, at 66 (Ripert (France)); 85 (Dennis (Great Britain)); 108-09, 189, 234 (Giannini (Italy)); 22[illegible] (Sabanin (U.S.S.R.)).

[36] Thus, the Conference benefited passengers as well as carriers. One of the French delegates to the Warsaw conference noted that "[i]n many countries the absolute exoneration clause exists," and that accordingly, "[w]e imagine too easily that we are going to create too favorable a system for the carrier. In many countries, the system of the Convention is a more rigorous one." Warsaw Minutes, *supra*, at 87 (Ripert (France)). Similarly, when, in a later discussion concerning carriage of goods, the Italian delegate suggested that the Convention's liability system "represents a very great mitigation of liability vis-a-vis the common law," *id.* at 99 (Ambrosini (Italy)), a French delegate responded:

> "What the Delegate from Italy has just said is perhaps true for his country and his law; but one risks asking France to ratify a convention which creates a system which will be less favorable than that under which the carrier operates at the present time. It will be the same in England, where the law is presently more favorable for the British carrier than it will be tomorrow if she ratifies the Convention." *Id.* at 99 (Flandin (France)).

As M. Giannini, President of the preparatory committee, stated: "The Convention is a continual compromise[.] * * * I believe that here all of us have made concessions; we have worked to reconcile British rules with Continental rules." *Id.* at 185-86.

prohibition of exoneration clauses and a limitation on the carrier's liability:

> "With respect to limitations upon and exoneration from liability, the Convention begins with the fundamental principle that the exoneration clause must be prohibited, as much for persons as for goods.
>
> "But, under these conditions, the consignor might see carriage refused; moreover, *the operator must be able to measure the scope of the risks that he assumes*; it is to satisfy this double exigency that the draft prohibits the carrier from eliminating or reducing his liability below a certain value, and that *it limits at the same time the maximum liability of the carrier*. The parties can raise the value of the life of the passengers and the goods above the limit provided by means of a special clause."

Warsaw Minutes, *supra*, at 22 (emphasis added); see *id.* at 254 (CITEJA Report). Thus, in order to ensure that the carrier could "measure the scope of the risks that he assumes," the Warsaw Convention expressly limited "the maximum liability of the carrier" for injuries to passengers to the fixed sum of 125,000 francs. Warsaw Convention, Article 22(1).[37]

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[37] Similarly, the Convention expressly limited the carrier's liability for checked baggage and goods to a sum of 250 francs per kilogram. Article 22(2). As this Court recognized last term in *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, *supra*, 80 L.Ed.2d at 284, the drafters of the Convention sought not simply to place "some limit" on a carrier's liability for cargo, but "to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry." The drafters intended to create precisely such "a stable, predictable, and internationally uniform limit" in the context of liability to passengers as well. See, *e.g.*, *O'Rourke*, *supra*, 730 F.2d at 852 (" 'It is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages * * *.' ") (quoting *Reed* v. *Wiser*, *supra*, 555 F.2d at 1089); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967),

Moreover, the Convention made clear that, absent a "special contract" setting a higher limit, the prescribed limit could be broken only if the carrier failed to deliver the required ticket, Article 3(2), or if the damage was caused by the "wilful misconduct" of the carrier, Article 25(1). See pp. 24-25, *supra*. Except in these narrow circumstances, the Convention placed an absolute limit on the *amount* of damages that could be awarded.[28]

In short, the Minutes of the Warsaw Convention make clear that the framers sought to create a uniform system of liability for air carriers that ensured, on the one hand, that the carriers would stand liable for loss of

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cert. denied, 392 U.S. 905 (1968) (one of the "primary objectives" of the Warsaw Conference was "limitation of the carrier's liability for an airplane accident"); H. Drion, *supra*, at 1 ("[T]he principle of limitation of liabilities has aptly been called 'the governing principle in the legislation on air navigation'.") (footnote omitted).

[28] In contrast, the Convention left to national law the question of the *nature* of damages that could be obtained, along with the question of *who* could seek those damages. The Report accompanying the CITEJA draft that formed the basis for the Warsaw Convention explained:

> "The question was asked of knowing [sic] if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independently from the present Convention."

Warsaw Minutes, *supra*, at 255. The Convention itself provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention"; but, in the case of death or bodily injury, this provision is "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." Warsaw Convention, Article 24(1) & (2). The Convention, while setting the conditions and limits of liability, thus did not purport to decide who had the right to bring a damages action, or what the elements of damages were.

life and cargo and, on the other, that their maximum liability would be precisely limited and fixed so that the carrier could "measure the scope of the risks that he assumes."

B. The Purpose of the Montreal Agreement Was to Increase the Fixed Limit of Liability Within the Confines of the Warsaw Convention System.

The Montreal Agreement of 1966 was not intended to alter the Warsaw Convention's objective of providing a fixed and uniform limit on a carrier's liability. The Montreal Agreement effected an increase in the liability limit, but retained the principle that that limit is an absolute ceiling on the carrier's liability for the death or injury of a passenger.[29]

The Montreal Agreement is traceable primarily to the United States' longstanding dissatisfaction with the $8,300 liability limit of the Warsaw Convention and to this Nation's consequent efforts to secure an international agreement to increase that limit. International negotiations to increase the Warsaw Convention limit, beginning at The Hague in 1955 and leading ultimately to the Montreal Agreement in 1966, show that the United States always understood the Warsaw Convention limit on liability to preclude the award of any additional sum over and above that limit; that the United States' decision to accept the Montreal Agreement was premised on this understanding; that the United States' understanding that the limit was unbreakable was shared by other nations; and that, to the extent rapid compensation of plaintiffs was an objective of the Mon-

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[29] As the Second Circuit noted in *Reed* v. *Wiser*, *supra*, 555 F.2d at 1089, "at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters."

treal Agreement, that objective was to be served by eliminating the carrier's Article 20(1) defense of lack of fault, rather than by breaching the fixed liability limit when compensation is delayed.

1. *The Hague Conference.* In 1955, an international conference was convened at The Hague to consider revisions to the Warsaw Convention. The United States participated in that conference and initially sought to raise the Warsaw liability limit to 375,000 francs (approximately $25,000). Hague Minutes, *supra*, at 162-63; Lowenfeld, *supra*, 80 Harv. L. Rev. at 506. This proposal was unacceptable to almost all the delegations from other nations, so compromises were explored. The conference eventually agreed to double the original Warsaw limit to 250,000 francs (approximately $16,600) and, at the United States' suggestion, to add a new paragraph 4 to Article 22 of the Convention providing that "[t]he limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses incurred by the plaintiff." See Lowenfeld, *supra*, 80 Harv. L. Rev. at 508-09.[20]

The United States delegation sought this new provision because it would permit United States courts to award, consistently with the Convention, compensation up to the limit of $16,600 dollars and to compel the defendant carrier also to pay the plaintiff's attorneys' fees and costs. Hague Minutes, *supra*, at 270-71. The delegation explained that in the United States the compensation actually received by the plaintiff ordinarily would be less

[20] This new Article 22(4) further provided that the limit could not be exceeded by an award of fees and costs where the amount of the plaintiff's judgment, exclusive of fees and costs, "does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later." Lowenfeld, *supra*, 80 Harv. L. Rev. at 508.

than the damages awarded by the court because of contingent fee arrangements. *Id.* The United States' position was premised on the understanding that, unless amended by new Article 22(4), the Warsaw Convention would continue to bar American courts from awarding costs and fees over and above the limit of liability.

Delegates from other countries, on the other hand, expressed the view that under their legal systems no such amendment to Article 22 was necessary, because costs and fees were awarded to prevailing parties "aside from the amount awarded by way of damages." Hague Minutes, *supra*, at 272 (German delegate); *id.* at 273 (Portugese delegate); *id.* at 288 (British delegate). In their nations, "legal fees were awarded as a matter of course" whenever a case proceeded to trial and judgment. Lowenfeld, *supra*, 80 Harv. L. Rev. at 508. Accordingly, from their perspective, responsibility for litigation costs was wholly separate from the carrier's liability to the plaintiff, and only the latter was limited by Article 22. See *id.* But once the Conference understood that, in the United States, a plaintiff's litigation costs ordinarily are paid by the plaintiff out of his judgment, Article 22(4) was adopted. See Hague Minutes, *supra*, at 288, 298 (explanation of United States delegate).

The consideration and adoption of new Article 22(4) by the Hague Conference is significant in two respects. First, the United States' proposal for a provision to permit separate awards of legal fees and costs demonstrates that the Article 22(1) limit was understood by the American delegation to be an absolute limit on the total amount that the carrier may be required to pay. Second, the delegates from other countries shared the United States' understanding that Article 22 strictly limits the amount of damages that may be awarded against a carrier, even though many considered the amendment to be unnecessary for their countries, where litigation costs were routinely paid to a prevailing plain-

tiff wholly apart from the award of damages. The shared understanding that Article 22(1) absolutely limits the damages that may be awarded against a carrier means that prejudgment interest is necessarily subject to the limit of Article 22, since it is one element of compensatory damages, see pp. 21-23, *supra*.

2. *The United States' Denunciation of the Warsaw Convention.* The United States Senate never voted on ratification of the Hague Protocol,[31] primarily because many Americans considered the $16,600 limit to be too low. See, *e.g.*, *Reed* v. *Wiser*, *supra*, 555 F.2d at 1087; *Hague Protocol to Warsaw Convention*, Hearings on Exec. H Before the Senate Comm. on Foreign Relations, 89th Cong., 1st Sess. 5, 15, 63-64, 89 (1965); see generally Lowenfeld, *supra*, 80 Harv. L. Rev. at 509-16, 532-46.[32] Following an unsuccessful effort in 1965 by the United States Government to persuade American carriers to agree by "special contract" to a $100,000 limit of liability, the United States on November 15,

[31] The Protocol To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371, *reprinted in* A. Lowenfeld, *Aviation Law* 955 (2d ed. Doc. Supp. 1981).

[32] From 1955 to 1965, neither the Executive Branch nor the Senate Foreign Relations Committee took a firm position on ratification. In 1965, however, the Senate Foreign Relations Committee reported favorably on the Hague Protocol with the condition that complementary legislation be enacted to require all American carriers to provide and pay for an additional $50,000 in aviation accident insurance coverage for all passengers carried on journeys covered by the Warsaw Convention. S. Exec. Rep. No. 3, 89th Cong., 1st Sess. 6-7 (1965). The Committee stated that if such insurance legislation was not promptly enacted, "the Department of State should take immediate steps to denounce the Warsaw Convention and Hague protocol." *Id.* at 7. The Administration ascertained soon thereafter that the complementary insurance legislation stood no chance of passage. See *Reed* v. *Wiser*, *supra*, 555 F.2d at 1086-87; Lowenfeld, *supra*, 80 Harv. L. Rev. at 546.

1965 deposited with the Polish Government a formal notice of denunciation of the Warsaw Convention, to take effect on May 15, 1966. Lowenfeld, *supra*, 80 Harv. L. Rev. at 546-52.[33] The notice was given "solely because of the low limits of liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955." Notice of Denunciation, *reprinted in* 53 U.S. Dep't of State Bull. 923, 924 (1965). At the same time, the State Department issued a press release stating that the United States would withdraw the notice of denunciation if prior to its effective date "there is a reasonable prospect of an international agreement" increasing the Warsaw limit to "the area of $100,000 per passenger" and "if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger." *Id.* at 924.

3. *The Montreal Conference and Agreement.* In an effort to avert the United States' impending withdrawal from the Warsaw Convention, an international conference convened in Montreal in February 1966. The conference was authorized to consider proposals only for the limited purpose of making recommendations to a future diplomatic conference with the actual authority to revise the Convention. International Civil Aviation Organization, *Minutes of Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and Hague Protocol, Montreal, Feb. 1966*, p. v [hereinafter "Montreal Minutes"]. The United States proposed that

[33] The term "denunciation" in this context refers to a formal withdrawal from a treaty in accordance with a provision in that treaty. Article 39 of the Warsaw Convention provides for denunciation by any of the parties through notification of the Government of Poland and for the denunciation to be effective six months later.

the conference recommend a limit of $100,000, inclusive of all costs and attorneys' fees. International Civil Aviation Organization, *Documents of Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and The Hague Protocol, Montreal, Feb. 1966*, at 184 [hereinafter "Montreal Documents"]; Montreal Minutes, *supra*, at 27, 36.[84] This proposal obtained virtually no support from other delegations; an exploratory vote resulted in only two delegations voting for the United States' proposal. Montreal Minutes, *supra*, at p. xxvii. Most delegations expressed opposition or reluctance to raising the limit above $50,000. *E.g.*, Montreal Minutes, *supra*, at 16-26.

The delegate from Sweden raised an additional objection to the United States' proposal. Recalling the Hague debate over Article 22(4), he stated that the United States' proposal for a limit inclusive of attorneys' fees would have the effect of creating a lower limit of compensation in the United States than elsewhere, since in the United States "the attorneys received a percentage of the compensation awarded the victims." Montreal Minutes, *supra* at 32. The German delegate made a similar observation, and suggested that the national differences regarding payment of legal fees would support a compromise that would both equalize compensation among American and other plaintiffs and bridge the gap between the United States and countries insisting on a lower limit of liability. The German delegate proposed "a maximum limit of $100,000 including legal fees or a maximum of approximately $70,000 excluding legal fees." Montreal Documents, *supra*, at 190; Montreal Minutes, *supra*, at

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[84] In keeping with its position that the $100,000 limit should be inclusive of legal fees and costs, this proposal of the United States called for deletion of Article 22(4) of the Hague Protocol, the provision permitting an award of fees and costs above the liability limit; that provision had been included in the Hague Protocol at the instance of the United States. See pp. 34-36 *supra*.

38. The United States delegation expressed support for this proposal. *Id.*

Although the majority of delegations thought that the figures of $100,000 and $70,000 were unacceptably high, Montreal Minutes, *supra*, at 87, the concept of dual limits depending on the inclusion or exclusion of legal costs reappeared in a joint proposal made by Sweden, Germany, New Zealand, and Jamaica. This four-power proposal "called for a split-level plan, with the higher limit set at 74,700 dollars (9 times Warsaw) and the lower level set at 58,100 dollars (7 times Warsaw)." Lowenfeld, *supra*, 80 Harv. L. Rev. at 570; see Montreal Documents, *supra*, at 228. In addition, the Swedish delegate recommended that the four-power proposal be coupled with elimination of the issue of fault or negligence; it was proposed that this be accomplished by deleting Warsaw Convention Article 20(1), which made the affirmative defense of lack of fault available to the carrier. Montreal Documents, *supra*, at 207; Montreal Minutes, *supra*, at 90-91; see Lowenfeld, *supra*, 80 Harv. L. Rev. at 570.

The United States delegation stated that it would recommend withdrawal of its Government's notice of denunciation if a consensus appeared in favor of the four-power proposal, and would "even make a somewhat stronger recommendation with possibly more chance of success if absolute liability were retained" in the proposal. Montreal Minutes, *supra*, at 103. Two members of the United States' delegation have explained why the four-power proposal coupled with absolute liability appealed to the delegation: "It would enable the delegation to tell Washington that in return for reducing its demands for a 100,000 dollar limit, it had secured what seemed to be a substantial benefit to passengers in terms of speed and certainty of recovery and probably reduction of legal expenses as well." Lowenfeld, *supra*, 80 Harv. L. Rev. at 571. Because litigation would be shortened and payment hastened, "the value of plaintiffs' recoveries would • • •

be substantially greater than under the Warsaw system[,]" since "litigation and delay seriously impair the value of the compensation eventually awarded." *Id.* at 587, 600.

The delegate of France spoke against the proposed system of dual limits. He argued, among other things, that the inclusion of legal costs in the higher limit would serve as "an encouragement to prolonging the action. The defendant would have every interest in doing so, since the higher limit was contractual. Thus, to the extent that that limit involved additional costs which would naturally fall upon the claimant in his continued effort to obtain compensation, the defendant would not be adversely affected by prolonging the action." Montreal Minutes, *supra*, at 75-76.[38]

After considerable debate, the conference held exploratory votes on the four-power proposal, both with and without the provision for deletion of the carriers' Article 20(1) defense. The conference soundly defeated the split-level proposal when coupled with elimination of Article 20(1). Montreal Minutes, *supra*, at 96. The split-level proposal standing alone, however, received 23 affirmative votes, 18 negative votes, and 10 abstentions. *Id.* But the United States delegation did not view this vote as providing it with sufficient hope that an acceptable international agreement would eventually be reached to justify recommending withdrawal of the notice of denunciation. Additional efforts to secure a consensus for the four-power proposal failed, and the Montreal Conference drew to a close with little prospect that the United States would withdraw its notice of denunciation. See Lowenfeld, *supra*, 80 Harv. L. Rev. at 573-75.

As the date for the United States' withdrawal from the Warsaw Convention drew near, however, negotiations

[38] The French Delegate favored the approach of Article 22(4) as adopted at The Hague, which authorized separate awards of fees and costs over and above the limit of liability. Montreal Minutes, *supra*, at 75, 85.

among the United States Government, certain foreign governments, and international carriers resumed and intensified. *Id.* at 586-96. These negotiations culminated in the Montreal Agreement, an agreement among carriers approved by the U.S. Civil Aeronautics Board,[39] which took its terms from the four-power proposal: dual liability limits of $75,000 and $58,000 combined with waiver of the carriers' Article 20(1) defense. See *id.* This agreement enabled the United States to withdraw its denunciation of the Warsaw Convention on May 14, 1966. 54 U.S. Dep't of State Bull. 955 (1966).

4. *Implications of the Origins of the Montreal Agreement.* Two major points bearing on the present case emerge from the origins of the Montreal Agreement. First, the $75,000 limit of liability was considered by all as establishing an absolute ceiling on the carrier's liability. The French delegate specifically observed that making that limit inclusive of attorneys' fees might create incentives for defendant carriers to delay payment of claims and to put claimants to the expense of trial, since the limit was "contractual" and could not be exceeded. An award of prejudgment interest over and above the $75,000 limit is entirely incompatible with the Montreal conferees' understanding that the limit would be all-inclusive, even if carriers might thereby be encouraged to delay payment of claims.

Second, the United States' willingness to recede from its insistence on a limit of $100,000 and, in exchange for the carriers' waiver of their Article 20(1) defense, to accept a limit of $75,000, also reflects an understanding that the limit of liability is absolute in a way that

[39] The Board approved the Montreal Agreement pursuant to former 49 U.S.C. § 1382 (1976), which required it to approve certain "cooperative working arrangements" between or among air carriers "that it does not find to be adverse to the public interest." Section 1382 was substantially amended in 1978, in conjunction with the deregulation of the airline industry.

precludes an award of prejudgment interest over and above that limit. The United States Government accepted the lower limit of $75,000 in combination with absolute liability because "[e]xperience had shown that in major personal injury and death cases litigation and delay seriously impair the value of the compensation eventually awarded." Lowenfeld, *supra*, 80 Harv. L. Rev. at 600 (footnote omitted). The United States believed that the elimination of the carrier's Article 20(1) defense of lack of negligence would in many cases permit resolution of claims prior to a complete accident investigation and without protracted litigation. Thus, the United States accepted the $75,000 limit on the theory that a prompt recovery of $75,000 is economically comparable to a recovery of $100,000 after extensive delay, and that the elimination of Article 20(1) would facilitate prompt recoveries. A central assumption of this theory is that prejudgment interest cannot be awarded over and above the limit of liability. If such awards were permissible, a $100,000 limit under a regime where recoveries are often delayed would not be economically comparable, from a plaintiff's standpoint, to a $75,000 limit under a regime that facilitates quick recoveries. Instead, prejudgment interest could be added to the $100,000 limit to compensate the plaintiff for delay. In short, the United States' adoption of the Montreal Agreement was based on its understanding that the limit on liability is inclusive of any prejudgment interest.

Thus, the Fifth Circuit in *Domangue* was mistaken when it reasoned that prejudgment interest over the $75,000 limit could be allowed because the United States viewed the Montreal Agreement as facilitating the speedy disposition of claims. 722 F.2d at 261-262. To the extent that rapid compensation was an objective of the United States in adopting the Montreal Agreement, that objective was to be accomplished by elimination of the issue of fault, not by any adjustment to the agreed-upon limit of liability. It was because the United States

Government understood that no adjustment could be made to the absolute limit that it viewed elimination of the potential delay caused by the availability of the carrier's Article 20(1) defense as a reasonable *quid pro quo* for moving from insistence on a fixed $100,000 limit to acceptance of a fixed $75,000 limit.[27]

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[27] The international community's desire to promote more rapid recoveries through the elimination of litigable issues of fault is also reflected in the 1975 Montreal Protocol No. 3, a revision to the Warsaw Convention that has not yet been ratified by the Senate. Montreal Protocol No. 3 would substantially increase the limit of liability for each passenger to approximately $120,000 (100,000 "Special Drawing Rights," see *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, *supra*, 80 L.Ed.2d at 280 & n.14), and would provide that this limit was unbreakable "whatever the circumstances which gave rise to the liability," thus eliminating the current exception from the liability limit where the carrier's wilful misconduct is shown to be the cause of the accident, see p. 24, *supra*. See Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as Amended, Art. II, *done* at Montreal, Sept. 25, 1975, *reprinted in* A. Lowenfeld, *Aviation Law* 985, 985-87 (2d ed. Doc. Supp. 1981); Protocol To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as Amended, Art. IX, *done* at Guatemala City, Mar. 8, 1971, *reprinted in* A. Lowenfeld, *supra*; S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 3-4, 37 (1981). The elimination of wilful misconduct as an issue for litigation was understood as one means to effectuate more rapid compensation, see 129 Cong. Rec. S2243-44 (daily ed. Mar. 7, 1983) (statement of Sen. Percy); *id.* at S2270 (daily ed. Mar. 8, 1983) (statement of Sen. Kassenbaum), in conjunction with a provision to encourage settlement within six months.

Montreal Protocol No. 3 has not been ratified. Although the Senate Committee on Foreign Relations reported in favor of ratification (S. Exec. Rep. No. 1, 98th Cong., 1st Sess. 1-2 (1983); S. Exec. Rep. No. 45, *supra*), the Protocol failed to receive the necessary two-thirds majority of the full Senate. 129 Cong. Rec. S2279 (daily ed. Mar. 8, 1983) (vote of 50 to 42 in favor of ratification).

III. THE PLAIN LANGUAGE AND PURPOSES OF THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT CANNOT BE OVERRIDDEN BY THE EQUITABLE CONSIDERATIONS RELIED ON BY THE COURTS BELOW.

In *Domangue*, the Fifth Circuit justified the allowance of prejudgment interest over and above the limit of liability, in part, because it was "influenced by the inequity of Eastern Airlines benefiting from the length of time between the crash and a final judgment in this case, to the detriment of decedent's survivors." 722 F.2d at 264. But it was not the function of that court to bring equitable considerations to bear on the interpretation of the Warsaw Convention as supplemented by the Montreal Agreement, nor to balance its view of the equities against the plain language and recognized objectives of those international agreements.[28]

Other courts, to be sure, have noted that the liability limit of $75,000 "may be anachronistic," *O'Rourke*, *supra*, 730 F.2d at 853, or that the limitation may not be justifiable today "by the conditions that existed in 1934," *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1308 (9th Cir. 1982). But these courts also have recognized that they are bound to enforce the Warsaw Convention as supplemented by the Montreal Agreement according to the intent of the drafters and signatories and that they may not substitute their own judgment for that of the framers. *O'Rourke*, *supra*, 730 F.2d at 853; *In re Aircrash in Bali, Indonesia*, *supra*, 684 F.2d at 1308 (noting also that "Congress has had ample opportunity to reconsider the wisdom of the Convention, but it has yet to effect any changes."). In holding that prejudgment interest could be awarded over and above the limit of liability—in essence creating a new exception to the limitation—the court below disregarded its proper role in construing a treaty. That role was defined by this Court many years ago:

> "[T]his court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties, by just rules of interpretation, applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821).

For half a century, the Warsaw Convention has defined and limited an air carrier's liability for international passengers in accordance with the intentions of its framers. Whatever "imperfections or difficulties" the courts below may have found in its text, or in the text of the Montreal Agreement, were not for those courts to correct.

---

[28] The equities in this case do not, in any event, support the award of prejudgment interest made against Eastern. Respondent did not move for partial summary judgment on the application of the Warsaw Convention as supplemented by the Montreal Agreement until almost three years after the date of suit, and then made an oral motion on the morning of trial that did not comply with the requirements of Fed. R. Civ. P. 56. *Winbourne* v. *Eastern Air Lines, Inc.*, *supra*, 632 F.2d at 221, 222-24. After the Second Circuit reversed the grant of summary judgment, Respondent did not renew his motion. Instead, summary judgment on the application of the limitation of liability ultimately was granted on the motion of Eastern. J.A. 73. Under Fed. R. Civ. P. 56(a), however, Respondent could have moved for summary judgment at any time after twenty days from the date of suit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 15, 1984

APPENDIX

APPENDIX

MONTREAL AGREEMENT

1966

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL[1]

[Reprinted from A. Lowenfeld, *Aviation Law* 971 (2d ed. Doc. Supp. 1981)]

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

---

[1] Agreement CAB 18900, approved by order E23630, May 13, 1966 (Docket 17325).

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who was wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of

a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other[3] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958,

[3] Either alternative may be used.

as amended, and filed with other governments as required. The Agreement shall become effective upon approval of said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

_____

_____

_____

JOINT

APPENDIX

Office - Supreme Court, U.S.
FILED
NOV 15 1984
STEVAS,
CLERK

No. 83-1807 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.,
Petitioner,

v.

ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 4, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

BEST AVAILABLE COPY

11-7-84

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	Western District of Louisiana
1975	
December 4	Complaint Filed
1976	
January 28	Answer by Eastern Air Lines
	Third-Party Complaint by Eastern Air Lines Against United States
	Eastern District of New York
March 8	E.D.N.Y. Receives Order of Transfer by MDL Panel
April 6	Eastern's Interrogatories to Plaintiff
April 8	United States' Answer to Eastern's Third-Party Complaint
June 21	Plaintiff's Amended Complaint
July 26	Answer of Boeing to Amended Complaint
July 30	Ansewer of Eastern to Amended Complaint
	Answer of United States Aviation Underwriters
	Answer of Kleven & Eberhart
August 2	Answer of United States and Crossclaim Against Other Defendants
September 28	Answer of Eastern, Kleven & Eberhart to Crossclaim of United States
1978	
April 6	Notice to Take Mahfoud's Deposition
September 26	Bramwell, J., Order of 9/22/78 Granting Plaintiff's Motion for Summary Judgment and Judgment on the Pleadings; Clerk Directed to Enter Judgment for Plaintiff on Issue of Liability

DATE	PROCEEDINGS
September 28	Clerk's Judgment of 9/26/78 in Favor of Plaintiff and Against Eastern on Issue of Liability Only
October 27	Eastern's Notice of Appeal from Judgment on Liability
1979	
February 5	Eastern's Motion for Certification
March 2	Plaintiff's Motion to Amend Judgment
March 8	Eastern's Opposition to Plaintiff's Motion to Amend Judgment
March 23	Eastern's Motion for Certification Argued and Granted; Plaintiff's Motion to Amend Argued and Granted; Opinions to Follow
May 17	Opinion of Bramwell, J.
June 5	Order Dated 6/1/79 Reaffirming Summary Judgment for Plaintiff
September 24	Index to Record on Appeal Certified to Court of Appeals
1980	
October 31	Order from Court of Appeals Reversing Judgment of District Court; Remanding for Further Proceedings; and Taxing Costs Against Appellees
1981	
January 26	Plaintiff's Request for Trial on Damages
April 29	Stipulation Dismissing Defendants Kleven, Eberhart, United States Aviation Underwriters, Boeing Co., and Port Authority of New York and New Jersey
June 23	Pretrial Conference
September 11	Plaintiff's Supplemental Answers to Interrogatories

DATE	PROCEEDINGS
1982	
February 16	Plaintiff's Supplemental Answers to Interrogatories
March 23	Eastern's Request to Admit
April 23	Eastern's Motion for Summary Judgment Based on Warsaw
May 4	Amended Transfer Order of 5/3/82
	Western District of Louisiana
July 13	Record Received from Clerk of E.D.N.Y.
	U.S. Answers to Plaintiff's Request for Admissions
August 23	Minute Entry Setting Dates for Trial and for Eastern to Supplement its Motion for Summary Judgment
September 7	Eastern's First Supplemental Memorandum in Support of Summary Judgment
September 30	Plaintiff's Memorandum in Response to Eastern's Motion for Summary Judgment
October 25	Eastern's Second Supplemental Memorandum in Support of Summary Judgment
October 28	Plaintiff's Supplemental Memorandum of Law
November 3	Eastern's Response to Plaintiff's Supplemental Memorandum
November 10	Status Conference; Trial Date Remains 12/6/82
November 16	Ruling Allowing Plaintiff to Recover Prejudgment Interest
December 1	Proposed Pretrial Order
December 2	Eastern's Motion to Deposit Money in Registry

DATE	PROCEEDINGS
1982	
December 3	Order Granting Eastern Leave to Deposit $150,000
	Eastern's Motion for Reconsideration of Ruling on Interest
December 6	Trial on Plaintiff's Damage Claims Against United States
December 27	Plaintiff's Opposition to Eastern's Motion for Reconsideration
December 28	Minute Entry Denying Eastern's Motion for Reconsideration
1983	
April 5	Ruling on Plaintiff's Damage Claims Against United States
April 21	Judgment for Plaintiff
May 6	Eastern's Notice of Appeal
May 16	Minute Entry Requiring Eastern to Post Supersedeas in the Amount of $90,000
May 19	United States' Notice of Appeal
May 26	Plaintiff's Notice of Appeal
	Order Approving Eastern's Supersedeas
	U.S. Court of Appeals for the Fifth Circuit
1983	
September 29	Order Denying Appellee's Motion to Dismiss Appeal, and Advising Counsel to Assume that the *Domangue* Panel Opinion Will Constitute Law of Circuit
1984	
March 8	Judgment of Court of Appeals Affirming District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Number 751292

ROBERT F. MAHFOUD, *et al.*

v.

EASTERN AIR LINES, INC., *et al.*

[Filed Dec. 4, 1975]

COMPLAINT

The complaint of Robert F. Mahfoud, a resident of Rapides Parish, Louisiana, in his capacity as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors, Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud, respectfully represents:

1.

Jurisdiction of this Court is based upon the provisions of 28 USC 1332 in that there exists between plaintiff and all defendants herein a complete diversity of citizenship, and the amount in controversy exceeds the sum of Ten Thousand and no/100 ($10,000.00) Dollars exclusive of interest and costs.

2.

Bernard F. Mahfoud and Odile W. Mahfoud, hereinafter called decedents, were married but once and then to each other on August 28, 1967, and the above named minor children are the only children and the sole heirs of the decedents.

3.

The following are made defendants herein:

(A) Eastern Air Lines, Inc., a Delaware corporation doing business in the State of Louisiana;

(B) Boeing Company, a Delaware corporation doing business in the State of Louisiana;

(C) Charlotte E. Kleven, Administratrix of the estate of J. W. Kleven, deceased, Captain of the hereinafter mentioned aircraft;

(D) Eugene S. Eberhart, Administrator of the estate of W. S. Eberhart, deceased, the pilot of the hereinafter mentioned aircraft;

(E) United States Aviation Underwriters, a foreign insurance corporation doing business in Louisiana, this defendant being the liability insurer of Eastern Air Lines, Inc., and the pilot and co-pilot of the hereinafter mentioned aircraft.

4.

On June 24, 1975, decedents were fare paying passengers of Eastern Flight #66 on an aircraft operated by Eastern on a regularly scheduled flight from New Orleans, Louisiana to John F. Kennedy International Airport, New York.

5.

At approximately 4:05 o'clock p.m., eastern daylight time, on June 24, 1975, Eastern Flight #66 crashed while attempting to land at the John F. Kennedy International Airport, and the decedents were killed in the crash.

6.

The crash of Flight #66 and the resulting deaths of decedents were proximately caused by the negligence of Eastern Air Lines, Inc., its pilots, agents and employees in the operation and maintenance of the aircraft prior

to the crash, and in the training and supervision of the flight crew.

7.

The said crash and resulting deaths of decedents were also proximately caused by the negligence of defendant, Boeing Company, its agents and employees for its failure to properly manufacture, design and equip the aircraft so that the same could be safely operated under the weather conditions existing at the time Flight #66 was engaged in its approach to John F. Kennedy International Airport on June 24, 1975, and in particular, for manufacturing and designing an aircraft which it knew or should have known could not be safely maneuvered and landed in adverse weather conditions.

8.

In the alternative, plaintiff invokes the doctrine Res Ipsa Loquitur.

9.

The following, in due course, will be made parties defendant:

(A) Port of New York Authority, owner and operator of the John F. Kennedy International Airport; and

WHEREFORE, PLAINTIFF PRAYS for judgment against all defendants, jointly, severally and in solido, in the sum of Nine Million and no/100 ($9,000,000.00) Dollars, with interest and costs; and further prays for trial by jury.

MANSOUR & DAVIS

By: /s/ Alfred A. Mansour
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 457 (HB)

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors, Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC.; BOEING COMPANY; CHARLOTTE E. KLEVEN, Administratrix of the Estate of J. W. Kleven, deceased; EUGENE S. EBERHART, Administrator of the Estate of W. S. EBERHART, deceased, and UNITED STATES AVIATION UNDERWRITERS, INC.

Defendants.

MDL Docket No. 227

EASTERN AIR LINES, INC., and UNITED STATES AVIATION UNDERWRITERS, INC.,

Third-Party Plaintiffs,

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant.

ANSWERS TO INTERROGATORIES PROPOUNDED TO PLAINTIFF

1. Plaintiff's current residence address is 1908 Marigold Street, Alexandria, Louisiana 71301. Plaintiff's residence address at the time of the accident was the same as above, however, he was temporarily in the Sultanate of Oman exploring for the "Venturer" (a mining company) at the time of the accident.

2. Bernard Fares Mahfoud: born July 22, 1932; Vice President of C. F. Bean Corporation; last residence was 4301 Lake Villa Drive, Metairie, Louisiana, however, was temporarily residing in Beirut, Lebanon on business of C. F. Bean Corporation. His address in Beirut, Lebanon was c/o C. F. Bean Corporation, Middle East Division, P.O. Box 19520, Beirut, Lebanon. The address of C. F. Bean Corporation in New Orleans is One Shell Square, Suite 3700, New Orleans, Louisiana 70139.

   Odile Wafic Mahfoud was born October 18, 1943. She was a housewife. The information concerning her residence addresses is the same as that given for Bernard Fares Mahfoud above.

3. Bernard's addresses during the last ten years are as follows:

   1966-1971: P.O. Box 22573, Louisiana State University, Baton Rouge, Louisiana 70803.

   1971-1973: Garden Lane Apartment #50, 401 20th Street, Gretna, Louisiana 70053.

   1973-July, 1974: 4301 Lake Villa Drive, Metairie, Louisiana 70002.

   July, 1974—to date of death: c/o C. F. Bean Corporation, Middle East Division, P.O. Box 195120, Beirut, Lebanon.

Odile's addresses during the last ten years are as follows:

1966-1967: Mitri, Bitar Building, Dannaoui Street, Moussaitbe, Beirut, Lebanon.

1967 to date of death: She was with her husband at the above mentioned addresses.

4. I am the brother of Bernard Fares Mahfoud and the brother-in-law of his wife, Odile Wafic Mahfoud.

5. The decedents had three children who are their sole heirs, namely, Paul Bernard Mahfoud who was born at Baton Rouge, Louisiana on September 24, 1969; Mireille Ma Belle Mahfoud who was born at New Orleans, Louisiana on August 16, 1971; and Natalie La Rose Mahfoud who was born at New Orleans, Louisiana on June 27, 1973.

6. No wills have been found. To my knowledge the decedents did not leave any wills.

7. Not applicable.

8. (a) The 24th Judicial District Court, Parish of Jefferson, State of Louisiana, located at Gretna, Louisiana.

   (b) Successions of Bernard F. Mahfoud and Odile W. Mahfoud, No. 179213, Division H. Tutorship of Mahfoud minors, No. 178967, Division E.

   (c) The succession proceedings were commenced on or about September 2, 1975, and the tutorship proceedings were commenced on or about August 22, 1975.

   (d) Yes.

   (e) No.

   (f) Not applicable.

   (g) Not applicable.

9. A detailed descriptive list in lieu of inventory was filed in the succession proceedings with the explanation that it was not complete. An amended detailed descriptive list will be filed within the near future.

10. House and lot, $63,000.00 less mortgage balance of $41,787.39; furniture and appliances approximately $2,300.00; checking account $4,238.12; check of C. F. Bean Corporation payable to the order of Bernard F. Mahfoud, $4,162.75; Thrift Plan with C. F. Bean Corporation, $3,892.07; various savings accounts totalling $53,701.02. The foregoing will be subject to some adjustments which the final list is filed and when the federal estate tax return and Louisiana inheritance tax returns are filed.

11. The only insurance policy which has been discovered is a group life insurance policy with John Hancock Mutual Life Insurance Company, Policy No. 13809-GTC which was obtained through C. F. Bean Corporation. The life of Bernard F. Mahfoud was insured for $50,000.00 with double indemnity provisions, and the life of Odile W. Mahfoud was insured for $1,000.00 with double indemnity provisions. The estates of the decedents have collected $102,000.00 on the policies. The husband and wife were beneficiaries of each other's insurance. The address of John Hancock Mutual Life Insurance Company is 200 Berkley Street, Boston, Massachusetts 02117. Affiant does not know the amount of the annual premium.

12. None known to affiant except possibly minor ailments such as colds, or influenza.

13. None that are known to affiant.

14. Not known to affiant.

15. None known to affiant except that the three children were born in hospitals in Baton Rouge and New Orleans.

16. Not to the knowledge of affiant.

17. Not to the knowledge of affiant.

18. Not applicable.

19. Not to the knowledge of affiant.

20. Not applicable.

21. Not to the knowledge of affiant.

22. Not to the knowledge of affiant.

23. Not applicable.

24. Bernard F. Mahfoud served his Syrian military service, however, affiant cannot recall his rank, serial number or branch of service. Dates of entry and discharge from service are approximately between 1955 and 1957. Odile W. Mahfoud was not in the military service.

25. No.

26. No.

27. Not applicable.

28. C, F. Bean Corporation, One Shell Square, Suite 3700, New Orleans, Louisiana 70139. This was the employer of Bernard. Odile was not employed at the time of the accident.

29. Not applicable.

30. Not applicable.

31. Not applicable.

32. The only information which affiant has with regard to these matters are a copy of decedents' 1974 income tax return prepared by Peat, Marwick, Mitchell & Company, New Orleans, indicating gross wages of $43,082.31 paid by C. F. Bean Corporation in wages to Bernard F. Mahfoud in 1974 which amount included $5,499.00 Subsistence, and the W-2 form issued by C. F. Bean Corporation showing 1975 wages in the amount of $30,833.30 of which $9,000.00 is shown as Subsistence. The 1975 income tax return was prepared by William A. Hillers, CPA, 3327 Jackson Street, Alexandria, Louisiana 71301. Affiant has no knowledge of decedents' income for the previous years, however, Bernard was employed by C. F. Bean Corporation, One Shell Square, Suite 3700, New Orleans, Louisiana 70139 during those years.

33. Not applicable.

34. Not applicable.

35. Not applicable.

36. Not to the knowledge of affiant.

37. Not to the knowledge of affiant.

38. As stated above, the 1974 and 1975 income tax returns were filed, and the amounts of gross income are stated above. Affiant has no knowledge concerning the income tax returns for the previous years, however, he believes that Peat, Marwick, Mitchell and Company, New Orleans, Louisiana may have information in this regard. The 1974 and 1975 income tax returns were joint, and affiant assumes that the income tax returns for the previous years were also joint.

39. The 1974 and 1975 Louisiana income tax returns were filed as joint returns. The gross income reported on the Louisiana returns were the same as those reported on the Federal returns. Affiant has no knowledge concerning the returns filed for the years preceding 1974.

40. 1974, $31,806.42. 1975, $18,707.21.

41. Not to affiant's knowledge.

42. Not applicable.

43. Affiant does not know the answer to this question.

44. The decedents left three children wholly dependent upon them for support.

45. The three children of decedents are Paul Bernard Mahfoud, born September 24, 1969; Natalie La Rose Mahfoud, born July 27, 1973; and Mireille Ma Belle Mahfoud, born August 16, 1971. At the present time the three children are living with their maternal grandmother in Beirut, Lebanon.

46. Affiant does not know the answer to interrogatory 46.

47. Not known at this time.

48. Excellent.

49. None to the knowledge of affiant.

50. None to the knowledge of affiant.

51. The children received birthday and Christmas gifts, none of any great value, from various friends and relatives.

52. None to the knowledge of affiant.

53. The children receive $65.00 per week total in Louisiana Workmen's Compensation retroactive to the date of the death of decedents.

54. (a) American International Underwriters Corporation issued the first check in the amount of $2,470.00 covering workmen's compensation benefits from June 25, 1975 through March 16, 1976 at $65.00 per week, the check being in the amount of $2,470.00 and payable to the order of Dr. Robert F. Mahfoud, Provisional Administrator and Tutor of Paul B. Mahfoud, Mireille M. Mahfoud and Natalie L. Mahfoud, only. Thereafter the insurance company has been paying $260.00 each four weeks.

(b) Answered above.

(c) Answered above.

(d) No.

(e) An affidavit was executed, copy attached.

55. No assignment has been made, however, under the provisions of the Louisiana Workmen's Compensation Act the insurer has the right to intervene and claim the amount of compensation benefits paid out of the proceeds of any recovery made by plaintiffs.

56. United States Fidelity and Guaranty Company has intervened in these proceedings claiming reimbursement of the compensation payments. The intervenor is represented by the law firm of Adams & Reese, by Robert B. Nolan, 4500 One Shell Square, New Orleans, Louisiana 70139. Affiant does not know why the compensation checks are issued by American International Underwriters Corporation and the intervention is filed by United States Fidelity and Guaranty Company.

57. Bernard F. Mahfoud, Social Security No. 438-66-0617. Odile W. Mahfoud, Social Security No. 435-86-3116.

58. No.

59. Not applicable.

60. Yes.

61. No.

62. Not applicable.

63. Not applicable.

64. Not applicable.

65. $9,000,000.00 for loss of support, love and guidance and other matters set forth in the Complaint.

66. No.

67. Not applicable.

68. Affiant does not know the answer to interrogatory 68.

69. Affiant does not know the answer to interrogatory 69.

70. Not applicable.

71. Flowers $52.00; grave diggers $40.00; Church-Clergy $210.00; accommodations $130.00; tombstones to be purchased for $1,000.00; miscellaneous expenses $50.00; total $1,482.00.

72. Workmen's Compensation benefits as stated above and Social Security payments. There has been no release, covenant not to sue, or similar documents executed in connection therewith. The social security payments are $546.00 per month.

73. Terre Sainte College, Lattaquie, Syria; degree in education from Aleppo Training College for Teachers, Syria; B.S. in civil engineering from Louisiana State University, Baton Rouge sometime between 1965 and 1967; M.S. in civil engineering from Louisiana State University, 1970; graduate work for Ph.D. program in Hydraulic Engineering, Louisiana State University; diploma in engineering management from Louisiana State University in 1973.

74. Affiant believes that Bernard had a Louisiana drivers' license, however, he does not know the number thereof.

75. The mortgage on the home mentioned above; Peat, Marwick, Mitchell and Company in New Orleans $600.00; C. F. Bean Corporation $1,972.58; Diners Club approximately $200.00; and some debts in

Syria and Lebanon, the exact amounts being unknown to affiant.

76. Not known to affiant.

77. Not applicable.

78. None to the knowledge of affiant.

79. Article 2315 of the Louisiana Civil Code and the decisions of the Appellate Courts of Louisiana.

80. Same as above.

81. through 89. Not known at this time.

90. No.

91. The decedents were on their way back to the Middle East Division of C. F. Bean Corporation in Beirut, Lebanon. The trip was made in connection Bernard's employment with C. F. Bean Corporation.

92. Answered above. The appointment of Robert F. Mahfoud as Legal Tutor of the three minor children is still in full force and effect.

93. No.

94. Not applicable.

MANSOUR & DAVIS

By: /s/ Alfred A. Mansour
ALFRED A. MANSOUR
P.O. Box 5511
Alexandria, Louisiana 71301

STATE OF LOUISIANA,
PARISH OF RAPIDES:

BEFORE ME, the undersigned Notary Public, in and for the State and Parish aforesaid, personally came and appeared ROBERT F. MAHFOUD, plaintiff in the captioned proceeding, who after being duly sworn, deposed that all of the foregoing answers to the interrogatories propounded to him by Eastern Airlines, Inc. are true and correct to the best of his knowledge, information and belief.

/s/ Robert F. Mahfoud
ROBERT F. MAHFOUD

SWORN TO AND SUBSCRIBED before me this 26th day of April, 1976.

/s/ [Illegible]
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

ROBERT F. MAHFOUD, *et al.*,
Plaintiff

v.

EASTERN AIR LINES, INC., *et al.*,
Defendants

MLD Docket No. 227

EASTERN AIR LINES, INC., and
UNITED STATES AVIATION UNDERWRITERS, INC.,
Third-Party Plaintiffs

v.

UNITED STATES OF AMERICA,
Third-Party Defendant

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR DAMAGES

Plaintiff, Robert F. Mahfoud, in his capacity as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors, Paul Bernard Mahfoud, Mirielle Ma Belle Mahfoud and Natalie La Rose Mahfoud, amends and supplements his original complaint for damages filed herein as follows:

1.

Paragraph 3 of the original complaint is amended to add as defendants herein, in addition to those named as defendants heretofore, the following party defendant:

(F) The Port Authority of New York and New Jersey, owner and operator of John F. Kennedy International Airport in New York, New York;

(G) United States of America, Department of Transportation, Federal Aviation Administration, Washington, D.C., operators of the Air Control Tower at John F. Kennedy Airport at New York, New York on June 24, 1975;

(H) United States of America, Department of Commerce, United States Weather Service, Washington, D.C., which had representatives in the Air Control Tower at John F. Kennedy Airport, New York, New York on June 24, 1975.

2.

Paragraph 10(A) is hereby added in addition to the original provisions of Paragraph 10:

10(A).

In addition to the acts of negligence of all defendants as set forth in plaintiff's original complaint, plaintiff further alleges that the crash of Eastern Air Lines Flight #66 on June 24, 1975 was caused as a result of the negligent erection, maintenance and operation of John F. Kennedy International Airport by the Port Authority of New York and New Jersey and the failure to take necessary procedures to avoid said crash due to the conditions existing at the time of the occurrence.

3.

Paragraph 10(B) is hereby added in addition to the original provisions of Paragraph 10:

10(B).

In addition to the acts of negligence set forth in plaintiff's original complaint, plaintiff further alleges that the concurrent negligence of the agents and employees of the United States Weather Service contributed to the occurrence of said accident in that said agents and employees failed to take appropriate action to recognize, detect, appraise and to notify all parties of existing weather conditions and circumstances and to disseminate information available to them, in the interest of the flight safety for those aboard the aircraft known as Eastern Flight #66, said negligence contributing to the occurrence of this accident.

4.

Paragraphs 14 and 15 are hereby added to the original complaint:

14.

On October 24, 1975 plaintiff delivered notice of the claim to Federal Aviation Administration, Division of Department of Transportation, Washington D.C., as required by the Federal Tort Claims Act, 28 U.S.C., 2671, et seq.

15.

On October 24, 1975 plaintiff delivered notice of the claim to the Port Authority of New York and New Jersey, and on January 13, 1976 plaintiff again delivered notice of the claim to the Port Authority of New York and New Jersey by filing and delivering with the Port of New York and New Jersey the form entitled "STATEMENT OF CLAIMANT FOR DAMAGES DUE TO AN ACCIDENT" which form was furnished to plaintiff's counsel by the Port Authority of New York and New Jersey.

WHEREFORE, PLAINTIFF PRAYS:

1. That all parties be served and cited according to law and in accordance with the orders of this Honorable Court;

2. Plaintiff be awarded judgment in solido against all defendants in the sum of $9,000,000.00 with interest from date of judicial demand until paid and all costs of these proceedings;

3. Plaintiff reaffirms all of the provisions of the original complaint and the prayer therein, including the request of a trial by jury.

MANSOUR & DAVIS

By: /s/ Alfred A. Mansour
ALFRED A. MANSOUR
P.O. Box 5511
Alexandria, Louisiana 71301
Attorneys for Plaintiff
Telephone (318) 445-3621

CERTIFICATE

I hereby certify that copies of the foregoing pleading has been mailed to all counsel of record at their respective offices.

Alexandria, Louisiana, this 17th day of June, 1976.

/s/ Alfred A. Mansour
ALFRED A. MANSOUR

ORDER

Let the above and foregoing amended and supplemental complaint be filed herein.

DONE AND SIGNED at Brooklyn, New York this — day of June, 1976.

_____

Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76-C-457 (HB)

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors, Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., BOEING COMPANY, CHARLOTTE E. KLEVEN, Administratrix of the Estate of J.W. Kleven, deceased, EUGENE S. EBERHART, Administrator of the Estate of W.S. Eberhart, deceased, UNITED STATES AVIATION UNDERWRITERS, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, UNITED STATES WEATHER SERVICE,

Defendants.

Trial by Jury Requested

EASTERN AIR LINES,
Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant.

MDL Docket No. 227

EASTERN AIR LINES' ANSWER TO AMENDED COMPLAINT

Defendant Eastern Air Lines, Inc. for its answer to the First Amended and Supplemental Complaint herein alleges upon information and belief as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 3(A) through 3(H), 7, 8, 9, 10, 10(A), 10(B), 11, 12, 13, 14 and 15 of the amended complaint except it admits that it is a Delaware corporation doing business in the State of Louisiana.

SECOND: Admits the allegations contained in paragraph 4 of the amended complaint except it alleges that the status of plaintiffs' decedents as passengers aboard Eastern Flight 66 was subject to all the terms and conditions of ticket contracts duly issued and delivered to said passengers.

THIRD: Admits the allegations contained in paragraph 5 of the amended complaint except it alleges that at all times herein Eastern Flight 66 was being operated pursuant to the rules, regulations, instruction and control of the Federal Aviation Administration.

FOURTH: Denies the allegations contained in paragraph 6 of the amended complaint.

FOR A FIRST DEFENSE

FIFTH: Plaintiffs lack the capacity to sue.

FOR A SECOND DEFENSE

SIXTH: The claims alleged herein may be governed by foreign law which is presently unknown to defendant Eastern Air Lines, Inc.; however, notice thereof will be given in accordance with Rule 44.1 of the Federal Rules of Civil Procedure upon ascertainment of the applicable facts.

FOR A THIRD DEFENSE

SEVENTH: The travel of plaintiffs' decedents involved international transportation subject to all the terms and conditions of the Warsaw Convention (49 Stat. 3000 *et seq.*), as amended by the Hague Protocol thereto (if applicable), and as supplemented by the Montreal Agreement of May 4, 1966 (if applicable), and defendant Eastern Air Lines, Inc., therefore claims exemption from and limitation of liability in accordance with the terms and conditions of the said Warsaw Convention and/or Hague Protocol and/or Montreal Agreement.

WHEREFORE, defendant Eastern Air Lines, Inc. demands judgment dismissing the amended complaint herein as against it, or limitation of liability in accordance with applicable law, together with the cost and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
Eastern Air Lines, Inc.

By /s/ Walter E. Rutherford
WALTER E. RUTHERFORD
One State Street Plaza
New York, N.Y. 10004

To: ALFRED A. MANSOUR, ESQ.
Mansour & Davis
Attorneys for Plaintiffs
1307 Texas Avenue
P.O. Box 5511
Alexandria, La. 71301

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 457 (HB)

ROBERT F. MAHFOUD, *et al.*,
Plaintiffs,

v.

EASTERN AIR LINES, INC., BOEING COMPANY, CHARLOTTE E. KLEVEN, Administratrix of the Estate of J. W. Kleven, deceased, EUGENE S. EBERHART, Administrator of the Estate of W. S. Eberhart, deceased, and UNITED STATES AVIATION UNDERWRITERS,
Defendants.

MDL Docket No. 227

EASTERN AIR LINES, INC.,
Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA,
Third-Party Defendants.

RESPONSE TO NOTICE TO PRODUCE

Plaintiff responds to the NOTICE TO PRODUCE filed by defendant Eastern Air Lines, Inc. as follows:

1. Copies of the 1974 and 1975 income tax returns are attached. Plaintiff does not have copies of the requested income tax returns for the previous years.

2. Same as above.
3. Copy of United States Estate Tax Returns attached.
4. The Louisiana Inheritance Tax Return has not yet been prepared. A copy will be forwarded when it is prepared. Plaintiff has obtained an extension for the filing of the Louisiana Inheritance Tax Return on or before September 24, 1976.
5. Plaintiff is not aware that there are any gift tax returns, and he believes that there are none.
6. (1) Copies of Letters of Administration and Tutorship attached.

   (2) Assets are set forth on the Federal Estate Tax Return, copy attached.

   (3), (4), (5), (6) & (7) There are none.

   (8), (9) & (10) None at this time.
7. Plaintiff has not yet determined what table or similar calculation of life expectancy will be used at the trial.
8. Only one receipt available at this time, copy attached. Other expenses confirmed verbally by Provisional Administrator.
9. Copy attached.
10. Birth certificates of children attached. Plaintiff does not have birth certificates of the decedents.
11. Plaintiff does not have any checkbook stubs or other matters called for in Number 11.
12. None in possession of plaintiff. See Estate Tax Returns for list of savings accounts.
13. Plaintiff does not have any of the matters or documents called for in Number 13.

14. Authorization attached.
15. Copy of marriage certificate attached.
16. There were no divorces.
17. Authorization attached.
18. Authorization attached.
19. Plaintiff does not have any W-2 forms, or copies thereof, other than those in the attached income tax returns.
20. Authorization attached.
21. The Amended Complaint filed by plaintiff sets forth the claim against the United States Government resulting from the deaths of decedents.

Alexandria, Louisiana, July 7, 1976.

MANSOUR & DAVIS
Attorneys for Plaintiff

By: _____
ALFRED A. MANSOUR
P.O. Box 5511
Alexandria, Louisiana 71301
Telephone (318) 445-3621

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

February 17, 1978

Mr. Robert L. Alpert
Vice President
U.S. Aviation Underwriters, Inc.
110 William Street
New York, New York 10038

Re: *Eastern Airlines Flight 66*,
Your No. VL 32407

Dear Bob:

This will confirm our telephone conversation of this afternoon that Associate Attorney General Michael Egan today approved the Government's participation in the settlement of the Eastern 66 litigation, according to the following terms and conditions, which we had previously discussed:

(1) The United States will contribute 40% to all passenger claims, except those involving government employees, previously settled by Eastern or its insurers, where there are no outstanding claims against the United States.

(2) In cases previously settled by Eastern or its insurers where there are claims outstanding against the United States, the United States will contribute 40% of the total amount, in all cases where the claim against the United States is compromised or adjudicated for an amount less than $25,000.

(3) In cases previously settled by Eastern or its insurers where there are claims outstanding against the United States, if the claim against the United States is compromised or adjudi-

cated for an amount in excess of $25,000, the United States will contribute nothing toward the settlement negotiated by Eastern and will bear its own costs.

(4) The United States will contribute 40% toward the settlement or payment of damage judgment of all other passenger claims, excluding any claims involving government employees.

(5) The United States will contribute 40% of the net insured value of the Boeing 727 aircraft.

(6) The United States will dismiss its pending third-party actions against Eastern and its insurers on account of claims of the crew, and enter into an agreement with Eastern and its insurers to hold them harmless against any claims by the cockpit or cabin crew in excess of their workmen's compensation or other insurance claims.

(7) The contribution of the United States under paragraphs (1), (2), (4), and (5), shall be limited to a total of 12 million dollars, and Eastern and its insurers shall enter into an agreement to hold the United States harmless against any claims in excess of that amount.

This agreement is a fair one, and represents a sound approach to the disposition of complex air carrier litigation. I know that you share my hope that the spirit of mutual cooperation and candor which made it possible will continue, and that we will be able to equitably and expeditiously resolve our differences in future cases.

Very truly yours,

/s/ Bill
WILLIAM G. SCHAFFER
Deputy Assistant
Attorney General

UNITED STATES AVIATION UNDERWRITERS
INCORPORATED

March 1, 1978

William G. Schaffer, Esq.
Deputy Assistant Attorney General
Civil Division
10th & Constitution Avenues, N.W.
Washington, D.C. 20530

EASTERN AIR LINES, INC.
J.F.K. International Airport
Date of Loss: June 24, 1975
USAIG No. VL 32407—Various

Dear Bill:

My review of your letter of February 17, 1978 reflects that it accurately sets forth most of the essential issues involved in the agreement between the United States and Eastern's insurers with respect to a settlement of the litigation arising out of this accident. However, there were a few additional issues which I believe you and I came to an understanding about and which I think should be set forth preliminarily in a letter prior to my drafting a formal settlement agreement.

It is my understanding that with respect to the passenger claims arising out of this accident, all of which are referred to in paragraphs (1), (2), (3) and (4) of your letter dated February 17, 1978, the United States will reimburse Eastern's insurers for 40% of the funeral expenses, medical expenses, cash advances and related expenses which have been or will be advanced in the interests of controlling litigation and reducing the ultimate settlements or judgments. As the present time, it appears that that amount is approximately $300,000.00.

In addition, the United States will reimburse Eastern's insurers for 40% of all of the costs and expenses (excluding attorneys' fees) involved in any further pretrial discovery, trial or appeal relating to the issues of dam-

ages in the unsettled passenger cases referred to in paragraph (4) of your letter.

As a condition precedent to the maximum limit of the contribution on the part of the United States referred to in paragraph (7) of your letter, Eastern's insurers, through the undersigned, will have complete control over the damage discovery, damage trials, appeals and any decisions relating to the settlement or non-settlement of a particular passenger case.

Lastly, it is my understanding that the Department of Justice will make every reasonable effort to see that Eastern's insurers will be reimbursed within 90 days for the monies referred to in paragraphs (1), (2) and (5) of your letter dated February 17, 1978 and all passenger related expenses and damage related expenses referred to in this letter. It goes without saying that the United States' share of any passenger settlements will be paid directly by it to the individual heirs or next-of-kin and will not be funded in any way by Eastern's insurers.

If all of the above accurately reflects our numerous telephone conversations please sign a copy of this letter which is enclosed and return same to my attention. I wish to thank you again for your efforts and cooperation in negotiating this settlement to what I believe is a mutually beneficial result.

Very truly yours,

ROBERT L. ALPERT

RLA:rp

The foregoing accurately reflects our agreement, except that the United States will not reimburse Eastern's insurers for any expenses incurred in cases described in Paragraph (3) of my letter of February 17, 1978, as discussed in our telephone conversation of March 14, 1978.

/s/ William G. Schaffer
3-22-78

[Sept. 1, 1978]

Honorable Henry Bramwell
United States District Judge
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Air Crash Disaster at John F. Kennedy
International Airport on June 24, 1975
M.D.L. Docket No. 227

Dear Judge Bramwell:

Regarding the above litigation, the Government now feels that it is in its best interests and in the best interests of the victims of this disaster to inform the Court and the parties to this litigation that the Government, while not admitting negligence, will not contest the issue of liability against it in the passenger cases. We appreciate the need to compensate the families of the innocent passengers in this case and feel that a trial will unduly waste the time of the Court and the parties. This concession is made without prejudice to the Government's position in the non-passenger cases. Likewise, this concession does not apply to cases involving military personnel and the cases to which the Federal Employees Compensation Act applies.

Additionally, we are advising the Court that the lawsuit involving the loss of the aircraft has been compromised between Eastern Air Lines and the United States and will be dismissed shortly.

We very much appreciate the time, attention and patience of the Court in this case. It is hoped that this case may in some way help continue the progress of the development of aviation safety for the benefit of all. We thank the Court.

Yours very truly,

BARBARA ALLEN BABCOCK
Assistant Attorney General

cc: All parties

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., BOEING COMPANY, CHARLOTTE E. KLEVEN, Administratrix of the Estate of J. W. Kleven, deceased, EUGENE S. EBERHART, Administrator of the Estate of W. S. Eberhart, deceased, UNITED STATES AVIATION UNDERWRITERS, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, UNITED STATES WEATHER SERVICE,

Defendants.

OFFER OF JUDGMENT

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant Eastern Air Lines, Inc., hereby offers to allow judgment to be taken against it in this action by the plaintiff in the amount of $150,000, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68 and is not to be construed either as an admission that said defendant is liable in this action or that the plaintiff has suffered any damage.

Dated: New York, N.Y.
September 14, 1978.

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant
Eastern Air Lines, Inc.

By /s/ Walter E. Rutherford
A member of the Firm
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

To:

ALFRED A. MANSOUR, ESQ.
MANSOUR & DAVIS
1307 Texas Avenue
P.O. Box 5511
Alexandria, Louisiana 71301
Attorneys for Plaintiff

BENJAMIN E. HALLER, ESQ.
HILL, BETTS & NASH
Suite 5215—One World Trade Center
New York, N.Y. 10048
Attorneys for The Boeing Company

PATRICK J. FALVEY, ESQ.
One World Trade Center—66S
New York, N.Y. 10048
Attorney for The Port Authority
of New York and New Jersey

MICHAEL J. PANGIA, ESQ.
Aviation Unit
Torts Section, Civil Division
United States Department of Justice
Washington, D.C. 20530
Attorney for United States of America

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 C 457

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors, Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., BOEING COMPANY, CHARLOTTE E. KLEVEN, Administratrix of the Estate of J.W. Kleven, deceased, EUGENE S. EBERHART, Administrator of the Estate of W.S. Eberhart, deceased, UNITED STATES AVIATION UNDERWRITERS, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, UNITED STATES WEATHER SERVICE,

Defendants.

MDL Docket No. 227

EASTERN AIR LINES, INC.,
Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant.

JUDGMENT

An order of Honorable Henry Bramwell, United States District Judge, having been filed on September 25, 1978, ordering that the plaintiff's motion for judgment on the pleadings and summary judgment is granted, and further

ordering that this action is several from the liability trial of the passenger cases in In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975 (MDL Docket Number 227) which commenced on September 18, 1978 and further

ordering that the Clerk of the Court is directed to immediately enter judgment in favor of the plaintiff herein against defendant, Eastern Air Lines, Inc., on the issue of liability only, it is

ORDERED and ADJUDGED that plaintiff's motion for judgment on the pleadings and summary judgment is granted, and it is further

ORDERED and ADJUDGED that this action is severed from the liability trial of the passenger cases in In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975 (MDL Docket No. 227) which commenced on September 18, 1978, and it is further

ORDERED and ADJUDGED that there being no just reason for delay, judgment is hereby entered in favor of the plaintiff herein against defendant, Eastern Air Lines, Inc., on the issue of liability only.

Dated: Brooklyn, New York
September 26, 1978

/s/ [Illegible]
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, etc.,
Plaintiff

vs.

EASTERN AIRLINES, INC., *et al.*,
Defendants

[Filed Mar. 2, 1979]

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that on the annexed affidavit of George E. Farrell, and the pleadings and prior proceedings herein, plaintiff joins with TIERNEY A. O'ROURKE, Public Administrator of Queens County, New York, as Administrator of the Estate of Derio Abatte, deceased, Plaintiff v. Eastern Airlines, Inc., et al., 76 Civ. 251, in its Motion dated January 23, 1979, and moves this Court, on March 9, 1979 at 10:00 A.M., or as soon hereafter as counsel may be heard, for an Order, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, amending the judgment entered in the above case on September 28, 1978 to provide that defendant Eastern Airlines, Inc. is liable under the Warsaw Convention, as supplemented by the Montreal Agreement, that defendant Eastern Airlines, Inc. is not precluded by the judgment from raising its defense of lack of capacity

to sue or any other defense it may have, and re-affirming the grant of summary judgment and/or judgment on the pleadings, and for such other and further relief as this Court may deem just and proper in the circumstances.

Dated: New York, New York
February 28, 1979

Attorneys for Plaintiff
HEALEY & FARRELL

By /s/ George E. Farrell
GEORGE E. FARRELL
A Member of the Firm
200 Park Avenue
New York, New York 10016
(212) 986-2515

TO: Haight, Gardner, Poor & Havens, Esqs.
Attorneys for defendant
Eastern Airlines, Inc.
One State Street Plaza
New York, New York 10004
(212) 344-6800

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, etc.,
Plaintiff

vs.

EASTERN AIRLINES, INC., *et al.*,
Defendants

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

GEORGE E. FARRELL, being duly sworn, deposes and says:

I am an attorney and a member of the firm of Healey & Farrell, attorneys for the plaintiff, and am familiar with the proceedings heretofore had herein. This affidavit is submitted in support of the Plaintiff's Motion to Amend the September 28, 1978 Judgment entered in his favor against defendant Eastern Airlines, Inc. (Eastern) on the issue of liability only under the Warsaw Convention, as supplemented by the Montreal Agreement. The purposes of this Motion are to make it clear and specifically provide in the judgment that Eastern is not precluded by the judgment from raising the defense of lack of capacity to sue or any other defense it may have; and to re-affirm the grant of summary judgment and/or judgment on the pleadings. Plaintiff joins with the motion of Tierney A.

O'Rourke, etc., Plaintiff vs. Eastern Airlines, Inc., etc., Defendant, 76 Civ. 251(HB), in which the pleadings and the facts and circumstances are precisely the same. Accordingly, in order not to burden the court by filing duplicate papers, your deponent respectfully incorporates those of the O'Rourke case herein by reference.

WHEREFORE, the plaintiff respectfully requests that the Court grant the Motion to Amend the September 28, 1978 Judgment entered in the instant action to provide that defendant Eastern Airlines, Inc. is liable under the Warsaw Convention, as supplemented by the Montreal Agreement, that defendant Eastern Airlines, Inc. is not precluded by judgment from raising its defense of lack of capacity to sue or any other defense it may have, to re-affirm the grant of summary judgment and/or judgment on the pleadings, and for such other and further relief as this Court may deem just and proper in the circumstances.

/s/ George E. Farrell
GEORGE E. FARRELL

Subscribed and sworn to
before me this 28th day
of February, 1979.

/s/ Juliet Schreider
Notary Public

My commission expires: 6/14/81

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 457

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors, Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., *et al.*,

Defendants.

MDL Docket No. 227

EASTERN AIR LINES, INC.,

Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant.

[Filed June 5, 1979]

ORDER

The plaintiff having moved to amend the judgment entered in the above case on September 28, 1978 to provide that defendant Eastern Air Lines is liable under the Warsaw Convention as supplemented by the Montreal Agreement, to reaffirm the grant of summary judgment and/or judgment on the pleadings, and defendant Eastern having opposed the motion, and the motion having been heard on March 23, 1979, and the Court having rendered its decisions on March 23, 1979 and May 11, 1979, it is hereby

ORDERED that plaintiff's motion to amend the liability judgment entered against Eastern Air Lines pursuant to the Warsaw/Montreal system to include specific language to the effect that said judgment does not preclude Eastern from raising the defenses that the plaintiff lacks the capacity to sue, that the commencement of this action was unauthorized by the decedent's next of kin, distributees and beneficiaries, and that the claims alleged herein may be governed by foreign law is granted. Said judgment does not preclude Eastern from raising the issue of interest or prejudgment interest or both; and it is further

ORDERED that plaintiffs' request for a reaffirmance of the grant of the Warsaw/Montreal motion and the resultant liability judgment entered against Eastern Air Lines in accordance therewith is granted.

Dated: Brooklyn, New York
June 1, 1979

/s/ Henry Bramwell
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ 457

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors of Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie LaRose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., *et al.*,

Defendants.

MDL Docket No. 227

EASTERN AIR LINES, INC.,

Third-Party Plaintiff,

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant.

[Filed June 5, 1979]

ORDER

Defendant Eastern Air Lines, Inc., having moved this Court for an order pursuant to Title 28, United States Code, Section 1292(b) granting certification for an immediate appeal of this Court's order of September 22, 1978 and judgment entered pursuant thereto on September 28, 1978, which order granted plaintiff's motion for

summary judgment and judgment on the pleadings, and directed entry of judgment against Eastern Air Lines, and the plaintiff having filed his opposition to said request for certification, and after due deliberation and filing of the Court's Memorandum of Decisions dated May 11, 1979, it is hereby

ORDERED that defendant Eastern Air Lines' motion for 28 U.S.C. 1292(b) certification is denied with regard to the issue of Eastern's liability for fault under the Warsaw Convention as supplemented by the Montreal Agreement. However, for the reasons set forth in this Court's Memorandum of Decisions dated May 11, 1979, 1292(b) certification is granted in that it is found that the grant of the plaintiff's Warsaw/Montreal motion for summary judgment and judgment on the pleadings and the entry of a liability judgment in accordance therewith, notwithstanding Eastern's defenses of lack of capacity, lack of authorization by the decedent's next of kin, and application of foreign law, present controlling questions of law as to which there are substantial grounds for a difference of opinion; and it is further found that the manner in which the plaintiff's Warsaw/Montreal motion was instituted and granted, despite Eastern's defenses, presents a controlling question of law as to which there is substantial ground for a difference of opinion; and it is further found that an appeal from the judgment herein will materially advance the ultimate termination of this litigation.

Dated: Brooklyn, New York
June 1, 1979

/s/ Henry Bramwell
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., BOEING COMPANY, CHARLOTTE E. KLEVEN, Administratrix of the Estate of J. W. Kleven, deceased, EUGENE S. EBERHART, Administrator of the Estate of W. S. Eberhart, deceased, UNITED STATES AVIATION UNDERWRITERS, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND UNITED STATES OF AMERICA, DEPARTMENT OF COMMERCE, UNITED STATES WEATHER SERVICE,

Defendants.

[Filed Apr. 29, 1981]

STIPULATION AND ORDER OF DISCONTINUANCE

IT IS HEREBY STIPULATED AND AGREED by and among the attorneys for the plaintiff and the attorneys for the respective defendants herein that this action is discontinued as to defendants Charlotte E. Kleven, Administratrix of the Estate of J. W. Kleven, deceased, Eugene S. Eberhart, Administrator of the Estate of W. S. Eberhart, deceased, United States Aviation Underwriters, Boeing Company, and The Port Authority of New York and New Jersey, without costs and without prejudice, reserving to the plaintiff all rights against defendants Eastern Air Lines, Inc., and the United States of America.

IT IS FURTHER STIPULATED that an order to this effect may be entered without further notice.

Dated: March 3, 1981.

HEALEY, FARRELL & LEAR
Attorneys for Plaintiff

By /s/ George E. Farrell
GEORGE E. FARRELL

905 16th Street, N.W.
Washington, D.C. 20006

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for
Eastern Air Lines, Inc.,
Charlotte E. Kleven,
Admx., etc.,
Eugene S. Eberhart,
Admr., etc., and
U.S. Aviation Underwriters

By /s/ Walter E. Rutherford
WALTER E. RUTHERFORD

One State Street Plaza
New York, N.Y. 10004

HILL, BETTS & NASH
Attorneys for Boeing Company

By /s/ Benjamin E. Haller
BENJAMIN E. HALLER
Suite 5215
One World Trade Center
New York, N.Y. 10048

PATRICK J. FALVEY, ESQ.
Attorney for The Port Authority
of New York and New Jersey

By /s/ Philip A. Maurer
PHILIP A. MAURER
One World Trade Center—66S
New York, N.Y. 10048

/s/ H. Richmond Fisher
H. RICHMOND FISHER
Attorney for United States
of America
United States Department
of Justice
Torts Branch, Civil Division
550 11th Street, N.W.
Washington, D.C. 20530

ADAMS & REESE
Attorneys for Intervenor
United States Fidelity
and Guaranty Co.

By /s/ [Illegible]
4500 One Shell Square
New Orleans, Louisiana 70139

SO ORDERED.

April 28, 1981.

/s/ Henry Bramwell
HENRY BRAMWELL
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., and
UNITED STATES OF AMERICA,

Defendants.

REQUESTS TO ADMIT

SIRS:

PLEASE TAKE NOTICE that, pursuant to Rule 36 of the Federal Rules of Civil Procedure, defendant Eastern Air Lines, Inc., requests plaintiff to admit for the purpose of this action the truth of the following facts:

1. On June 14, 1975, ticket No. 0574426844285 was issued in Paris, France, for passage for Mr. Mahfoud on Air France Flight 067 on June 16, 1975 from Paris to Houston, Texas, on Continental Air Lines Flight 420 on June 16, 1975, from Houston, Texas to New Orleans, Louisiana, on Eastern Air Lines Flight 66 on June 24, 1975, from New Orleans, Louisiana to New York, New York, and to return on Air France to Paris, France from New York, New York.

2. On June 14, 1975, ticket No. 0574426844286 was issued in Paris, France, for passage for Mrs. Mahfoud on Air France Flight 067 on June 16, 1975 from Paris to Houston, Texas, on Continental Air Lines Flight 420 on June 16, 1975, from Houston, Texas to New Orleans, Louisiana, on Eastern Air Lines Flight 66 on June 24, 1975, from New Orleans, Louisiana to New York, New York, and to return on Air France to Paris, France from New York, New York.

3. Mr. Mahfoud was in physical possession of ticket No. 0574426844285 prior to boarding Eastern Flight 66 on June 24, 1975.

4. Mrs. Mahfoud was in physical possession of ticket No. 0574426844286 prior to boarding Eastern Flight 66 on June 24, 1975.

5. Ticket No. 057442644285 contained the following notice printed in English and in French in type at least as large as ten point modern type and in ink contrasting with the stock:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey, to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger,

and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $9,000 or U.S. $18,000.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contract of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000.— above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000.— exclusive of legal fees and costs.

6. Ticket No. 0574426844286 contained the following notice printed in English and in French in type at least as large as ten point modern type and in ink contrasting with the stock:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be

applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey, to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $9,000 or U.S. $18,000.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contract of carriage. For further information, please consult your airline or insurance company representative.

NOTE: The limit of liability of U.S. $75,000.— above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000.— exclusive of legal fees and costs.

7. Ticket No. 0574426844285 complied with the requirements of 14 CFR section 221.175 for special notice of limited liability for death or injury under the Warsaw Convention.

8. Ticket No. 0574426844286 complied with the requirements of 14 CFR section 221.175 for special notice of limited liability for death or injury under the Warsaw Convention.

9. Mr. Mahfoud and Mrs. Mahfoud were traveling together on the flights listed in Request No. 1.

10. Mr. Mahfoud and Mrs. Mahfoud presented their tickets for the flights listed in Request No. 1 at approximately the same time.

11. Exhibit A is a true and correct copy of the ticket that Mr. Mahfoud used for his transportation on Eastern Air Lines Flight 66 on June 24, 1975.

12. Exhibit B is a true and correct copy of the ticket coupon that Mrs. Mahfoud used for her transportation on Eastern Air Lines Flight 66 on June 24, 1975.

13. The same notice of limitation of liability that appears in Exhibit A appeared in the ticket that Mrs. Mahfoud presented for her transportation on Eastern Air Lines Flight 66 on June 24, 1975.

Dated: New York, N.Y.,
March 19, 1982

Yours, etc.,

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant
Eastern Air Lines, Inc.

By /s/ Walter E. Rutherford
A member of the Firm

One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

To:

HEALEY, FARRELL & LEAR
Attorneys for Plaintiff
905 16th Street, N.W.
Washington, D.C. 20006

ELLIS G. SAYBE, ESQ.
2006 Suzenne Court
Alexandria, LA 71301

Copies to:

H. RICHMOND FISHER, ESQ.
Torts Branch, Civil Division
United States Department of Justice
550 11th Street, N.W.
Washington, D.C. 20530
Attorney for Defendant
United States of America

EDWARD R. KORMAN, ESQ.
U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 10201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC. and
UNITED STATES OF AMERICA,

Defendants.

[Filed Apr. 5, 1982]

ANSWERS TO REQUESTS FOR ADMISSIONS

Plaintiff, without conceding the relevancy or materiality of the matters stated herein, answers the Requests For Admissions of defendant Eastern Air Lines, Inc. as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

Dated: Washington, D.C.
April 2, 1982

HEALEY, FARRELL & LEAR
Attorneys for Plaintiff

By /s/ George E. Farrell
A member of the Firm

905 Sixteenth Street, N.W.
Washington, D.C. 20006
202/293-1550

To:

HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, New York 10004
Attorneys for Eastern Air Lines, Inc.

H. RICHMOND FISHER, ESQ.
Torts Branch, Civil Division
United States Department of Justice
550 11th Street, N.W.
Washington, D.C. 20530
Attorney for Defendant
United States of America

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC. and
UNITED STATES OF AMERICA,

Defendants.

[Filed Apr. 23, 1982]

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Walter E. Rutherford, Esq., sworn to on the 21st day of April, 1982, and upon the Requests to Admit, dated March 19, 1982, propounded by Eastern Air Lines, Inc. to plaintiff, plaintiff's Answers to Requests for Admissions, dated April 2, 1982, and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court, before the Honorable Henry Bramwell, on the 3rd day of May, 1982, at 10:00 a.m., in Court Room 9 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting defendant

Eastern Air Lines, Inc. partial summary judgment on its third defense pleaded in answer to the amended complaint and limiting its liability to $150,000 pursuant to the Warsaw Convention/Montreal Agreement, on the grounds that there are no material issues of fact and Eastern Air Lines, Inc. is entitled to partial summary judgment as a matter of law; and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
April 21, 1982

Yours, etc.

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant
Eastern Air Lines, Inc.

By /s/ Walter E. Rutherford
A Member of the Firm

One State Street Plaza
New York, New York 10004

To: HEALEY, FARRELL & LEAR
905 16th Street, N.W.
Washington, D.C. 20006

H. RICHMOND FISHER, ESQ.
Civil Division, Torts Branch
U.S. Department of Justice
550 11th Street, N.W.
Washington, D.C. 20530

BENJAMIN WILES, ESQ.
Assistant U.S. Attorney
Eastern District of New York
Federal Building
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)
MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC. and
UNITED STATES OF AMERICA,

Defendants.

STATEMENT PURSUANT TO LOCAL RULE 9(g)

SIRS:

PLEASE TAKE NOTICE that defendant Eastern Air Lines, Inc., pursuant to Rule 9(g) of the Local Rules of this Court, contends that there does not exist a genuine issue to be tried regarding the following material facts:

1. Bernard F. Mahfoud and Odile W. Mahfoud were passengers on Eastern Air Lines Flight 66 from New Orleans, Louisiana to New York, New York on June 24, 1975.

2. On June 14, 1975, ticket No. 0574426844285 was issued in Paris, France, for passage for Mr. Mahfoud on Air France Flight 067 on June 16, 1975 from Paris to Houston, Texas; on Continental Air Lines Flight 420 on June 16, 1975, from Houston, Texas to New Orleans,

Louisiana; on Eastern Air Lines Flight 66 on June 24, 1975, from New Orleans, Louisiana to New York, New York; and to return on Air France to Paris, France from New York, New York.

3. On June 14, 1975, ticket No. 0574426844286 was issued in Paris, France, for passage for Mrs. Mahfoud on Air France Flight 067 on June 16, 1975 from Paris to Houston, Texas; on Continental Air Lines Flight 420 on June 16, 1975, from Houston, Texas to New Orleans, Louisiana; on Eastern Air Lines Flight 66 on June 24, 1975, from New Orleans, Louisiana to New York, New York; and to return on Air France to Paris, France from New York, New York.

4. Decedents' transportation on Flight 66 on June 24, 1975, was international transportation governed by the Warsaw Convention/Montreal Agreement.

5. Prior to the commencement of the international travel referred to in No. 1, above, Mr. Mahfoud was in possession of ticket No. 0574426844285.

6. Prior to the commencement of the international travel referred to in No. 2, above, Mrs. Mahfoud was in possession of ticket No. 0574426844286.

7. Ticket Nos. 0574426844285 and 0574426844286, which were in decedents' possession, contained, in the English and French languages, notice of limitation of liability in the form and content required by the Warsaw Convention/Montreal Agreement.

8. Ticket Nos. 0574426844285 and 0574426844286, which were in decedents' possession, complied with the applicable CAB regulation (14 C.F.R. § 221.175) regarding notice of limitation of liability.

Dated: New York, New York
April 21, 1982

Yours, etc.

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant
Eastern Air Lines, Inc.

By /s/ Walter E. Rutherford
A Member of the Firm

One State Street Plaza
New York, New York 10004

To: HEALEY, FARRELL & LEAR
905 16th Street, N.W.
Washington, D.C. 20006

H. RICHMOND FISHER, ESQ.
Civil Division, Torts Branch
U.S. Department of Justice
550 11th Street, N.W.
Washington, D.C. 20530

BENJAMIN WILES, ESQ.
Assistant U.S. Attorney
Eastern District of New York
Federal Building
226 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

MDL Docket No. 227

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC. and
UNITED STATES OF AMERICA,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WALTER E. RUTHERFORD, being duly sworn deposes and says:

He is a member of the law firm of Haight, Gardner, Poor & Havens, attorneys for defendant Eastern Air Lines, Inc. in the above-captioned action, and is fully familiar with all of the facts and circumstances herein.

The affidavit is submitted in support of Eastern Air Lines' motion for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting Eastern Air Lines partial summary judgment on its third defense

pleaded in its answer [Exhibit 1] to the amended complaint [Exhibit 2] and limiting its liability to $150,000 ($75,000 per passenger) pursuant to the Warsaw Convention/Montreal Agreement.

Plaintiff commenced this action against Eastern Air Lines and the United States of America to recover damages for the death of Bernard F. Mahfoud and Odile W. Mahfoud, who were killed when the Eastern Air Lines jet aircraft (Eastern Flight 66) in which they were passengers crashed on its approach to John F. Kennedy International Airport, Queens, New York, on June 24, 1975. Mr. Mahfoud's passenger ticket, No. 0574426844285, was recovered from the accident site, and was subsequently produced by plaintiff in discovery. (A copy of the ticket is annexed hereto as Exhibit 3). Mrs. Mahfoud's passenger ticket was apparently destroyed in the accident, but Eastern retained the coupon for Mr. Mahfoud's and Mrs. Mahfoud's transportation on Eastern Flight 66, when they presented themselves for boarding. (Copies of the flight coupons are annexed hereto as Exhibit 4). As appears from Mr. Mahfoud's ticket and Mrs. Mahfoud's flight coupon, decedents' tickets were issued in Paris, France on June 14, 1975, for decedents' passage on Air France Flight 067 on June 16, 1975, from Paris to Houston, Texas; on Continental Air Lines Flight 420 on June 16, 1975, from Houston, Texas to New Orleans, Louisiana; on Eastern Flight 66 on June 24, 1975, from New Orleans, Louisiana to New York, New York; and to return on Air France to Paris, France from New York, New York. Thus, at the time of the accident, decedents were engaged in international transportation pursuant to the Warsaw Convention/Montreal Agreement.*

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* The United States adhered to the Warsaw Convention on October 29, 1934 (49 Stat. 3000) and France on November 15, 1932. W.S. Strauss, *Air Laws and Treaties of the World* 1368; Treaties in Force, January 1, 1981 (Dep't State Pub. 9136) 259. Eastern Air Lines has agreed to be bound by the provisions of the Montreal Agreement. 54 Dep't State Bull. 955-56 (1966).

In its answer [Exhibit 1] to the amended complaint, Eastern pleaded the limitation of liability of the Warsaw Convention/Montreal Agreement as an affirmative defense to plaintiff's claims:

> "FOR A THIRD DEFENSE
>
> Seventh. The travel of plaintiffs' decedents involved international transportation subject to all the terms and conditions of the Warsaw Convention (49 Stat. 3000 *et seq.*), as amended by the Hague Protocol thereto (if applicable), and as supplemented by the Montreal Agreement of May 4, 1966 (if applicable), and defendant Eastern Air Lines, Inc. therefore claims exemption from and limitation of liability in accordance with the terms and conditions of the said Warsaw Convention and/or Hague Protocol and/or Montreal Agreement."

There is absolutely no question that decedents' transportation on Eastern Flight 66 was subject to the Warsaw Convention/Montreal Agreement. On September 18, 1978, this Court granted plaintiff's oral motion for the entry of judgment against Eastern on the issue of liability on the basis of the Warsaw Convention/Montreal Agreement. (Copies of relevant pages of the transcript of September 18, 1978, are annexed hereto as Exhibit 5). On September 26, 1978, judgment [Exhibit 6] was entered against Eastern Air Lines, Inc. on the issue of its liability under the Warsaw Convention and Montreal Agreement. Subsequently, by Notice of Motion dated February 28, 1979, plaintiff moved, *inter alia*, to *reaffirm* the judgment against Eastern on the issue of liability under the Warsaw Convention/Montreal Agreement, and the motion was granted in Section II of this Court's 109-page Memorandum of Decisions and Orders, dated May 11, 1979, and incorporated into this Court's June 1, 1979 Order [Exhibit 7]. On October 6, 1980, the judgment was reversed by the Second Circuit in *Wirbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219, 224-25 (2d Cir. 1980),

holding that while Eastern did not contest its liability to the *decedent* under the Warsaw Convention/Montreal Agreement *, judgment could not be entered in favor of the *plaintiff* because of Eastern's affirmative defense challenging *plaintiff's* capacity to sue. However, since there was no issue as to Eastern's liability to the decedent under the Warsaw Convention/Montreal Agreement, the Second Circuit suggested that on remand plaintiff move under Rule 56(d) for "an order accomplishing the removal of Eastern's liability to the *decedents* (as distinguished from the particular plaintiffs) from the set of contested issues to be resolved at trial." 632 F.2d at 225.

Based on the foregoing, it appears that the plaintiff, Eastern Air Lines, this Court, and the Second Circuit are all in agreement that decedents' transportation on Eastern Flight 66 was governed by the Warsaw Convention/Montreal Agreement.

Furthermore, it is crystal clear that Eastern satisfied both the notice of limitation of liability requirements of the Warsaw Convention/Montreal Agreement and the ticket delivery requirements, and therefore, that Eastern's liability herein must be limited to $75,000 per passenger pursuant to the Warsaw Convention/Montreal Agreement. On March 19, 1982, Eastern served on plaintiff Requests to Admit (Exhibit 8), and on or about April 2, 1982, plaintiff served his Answers to Requests for Admissions (Exhibit 9, admitting all 13 requests propounded by Eastern. Requests/Answers Nos. 1 and 2 establish that decedents' tickets were for international transportation. Requests/Answers Nos. 3 and 4 establish that decedents were in possession of their respective tickets prior to boarding Eastern Flight 66. Requests/Answers Nos. 5 and 6 establish the wording of the limi-

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* In its Memorandum of Decisions and Orders, at page 11, this Court similarly observed that Eastern made *no* claim that the Warsaw Convention/Montreal Agreement did not govern this action.

tation of liability (in both English and French), the type size and legibility, which conform to the requirement of the Montreal Agreement. Requests/Answers Nos. 7 and 8 establish that decedents' tickets "complied with the requirements of 14 CFR Section 221.175 for special notice of limited liability for death or injury under the Warsaw Convention."

Accordingly, there are no issues of fact and Eastern is entitled to summary judgment as a matter of law limiting its liability to $75,000 per passenger pursuant to the Warsaw Convention/Montreal Agreement.

WHEREFORE, Eastern Air Lines, Inc. respectfully requests that this Court grant it partial summary judgment on the third defense pleaded in its answer to the amended complaint, and limit its liability to $150,000 pursuant to the Warsaw Convention/Montreal Agreement.

/s/ Walter E. Rutherford
WALTER E. RUTHERFORD

Sworn to before me this 21st
day of April, 1982.

/s/ Josephine Amante
JOSEPH AMANTE
Notary Public, State of New York
No. 60-0057100
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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76 Civ. 457 (HB)

ROBERT F. MAHFOUD, as Provisional Administrator of the Successions of Bernard F. Mahfoud and Odile W. Mahfoud, and as Legal Tutor of the minors Paul Bernard Mahfoud, Mireille Ma Belle Mahfoud and Natalie La Rose Mahfoud,

Plaintiff,

—against—

EASTERN AIR LINES, INC., and
UNITED STATES OF AMERICA,

Defendants.

[Filed May 4, 1982]

ORDER

By order dated April 14, 1982, the parties herein were directed to show cause why this case should not be transferred, pursuant to 28 U.S.C. 1404(a), to the jurisdiction wherein it was originally filed, and said motion having duly come on to be heard before this Court on April 26, 1982, and all parties being heard, it is hereby,

ORDERED that, pursuant to 28 U.S.C. 1404(a), this action is hereby transferred to the United States Distict Court for the Western District of Louisiana, Alexandria Division; and it is further

ORDERED that the motion by Eastern Air Lines, Inc., for partial summary judgment, dated April 21, 1982, which is presently pending before this Court, is referred to the transferee court for determination.

Dated: Brooklyn, New York, May 3d, 1982.
2:00 PM

/s/ Henry Bramwell
United States District Judge

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: 11/10/82

REPLY TO
ATTN OF: JUDGE NAUMAN S. SCOTT (jh)

SUBJECT: ROBERT F. MAHFOUD, ETC V. EASTERN AIRLINES, ET AL C.A. NO. 75-1292-A

TO: ALL COUNSEL OF RECORD

[Filed Nov. 10, 1982]

MINUTE ENTRY

A status conference was held in the above captioned case in open court on Monday, November 8, 1982, at 5:00 p.m. Counsel present were George Farrell for plaintiff, Francis G. Weller for Eastern Airlines, and the United States of America, and Robert Nolan for United States Fidelity & Guaranty Company. The defendants concede that procedural capacity is not an issue in this case. The court waives the requirement of local counsel under Local Rule 4 for George Farrell, counsel for plaintiff. The intervenor is to draft a stipulation regarding his Motion for Summary Judgment and submit it to the other counsel for approval and then to the court. The parties shall draft a pretrial order and submit it to the court within ten days after the court rules on motion by Eastern Airlines for partial summary judgment and the motion in limine by defendants. The case remains set for trial on December 6, 1982 at 9:00 a.m. in Alexandria, Louisiana. If either side has an unresolveable conflict and after considering the use of depositions in lieu of live testimony, they should contact the court regarding a continuance. It is estimated that trial in this case will last for two days if it is a judge trial and two and a half to three days if it is a jury trial.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Civil Action No. 75-1292

ROBERT MAHFOUD

—VS—

EASTERN AIRLINES, INC.

[Filed November 16, 1982]

RULING

Suit was commenced in this court on December 4, 1975 to recover damages for the deaths of Bernard F. Mahfoud and Odile W. Mahfoud. The principal defendant was Eastern Airlines, Inc. (Eastern). Decedents were killed when Eastern Flight 66, enroute from New Orleans to New York City, crashed on its approach to John F. Kennedy International Airport, Queens, New York, on June 24, 1975.

This action was transferred to Federal court in New York on February 4, 1976 pursuant to 28 U.S.C. § 1407 by the Judicial Panel of Multidistrict Litigation for consolidation pretrial proceedings. In June 1976, plaintiff filed an amended complaint naming the United States of America as a defendant. In May 1982, pursuant to 28 U.S.C. § 1404(a), the case was transferred back to this court.

MOTION IN LIMINE

Defendants have filed a Motion in Limine seeking a determination of the law applicable to the issue of damages in this case: the law of New York, or the law of Louisiana.

Plaintiffs' claims against the United States are governed by the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. § 1346 *et seq.* The F.C.T.A. provides that the Government's liability for damages shall be determined in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b). This requires the court to apply the entire law of the place of the accident, including its choice of law rules. *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Therefore, plaintiffs' claims against the United States are governed by the choice of law rules of New York, the place of the accident.

In determining choice of law, New York courts draw a distinction between issues of conduct and damages, and apply different choice of law standards to these issues within the same case. See *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2nd Cir. 1962); *Bing v. Halstead*, 495 F.Supp. 517 (S.D. N.Y. 1980); *Babcock v. Jackson*, 12 N.Y. 2d 473, 240 N.Y.S.2d 743 (1963).

When conduct is at issue, the doctrine of lex loci delecti is generally applied, because a jurisdiction has a strong interest in regulating conduct within its borders. *Gordon v. Eastern Airlines*, 391 F.Supp. 31 (S.D. N.Y. 1975); *Babcock, supra. See also Junco v. Eastern Airlines, Inc.*, 399 F.Supp. 666 (S.D. N.Y. 1975), *aff'd* 538 F.2d 310 (2nd Cir. 1976). However, when damages are at issue, New York has adopted a "grouping of contacts" or "governmental interests" approach to resolving conflict of law problems. See *Junco, supra; Gordon, supra; Thomas v. United Airlines*, 24 N.Y.2d 714, 31 N.Y.S.2d 973 (1969); *Miller v. Miller*, 222 N.Y.2d 12, 237 N.Y.E.2d 877 (1968); *Babcock, supra.*

Plaintiffs' decedents herein, Bernard and Odile Mahfoud, husband and wife, were domiciliaries of Louisiana.

Bernard had resided in Louisiana since November 21, 1961. He was born in Syria and was lawfully admitted to the United States for permanent residence on October 6, 1966 and had filed a petition for naturalization. He was educated at Louisiana State University, and at the time of his death his permanent residence was Metairie, Louisiana. He was employed by C. F. Bean Corporation (Bean), a company involved in dredging and other operations in all parts of the world. At the time of his death, Bernard was engaged in a temporary assignment for Bean in Beirut, Lebanon. At the time of the airplane crash, Bernard was returning to Lebanon from a business trip to Bean's headquarters in New Orleans. Decedent Odile Mahfoud was a domiciliary of Louisiana, with a permanent residence at Metairie, Louisiana. She was born in Beirut, Lebanon and was married to Bernard on August 28, 1967. She was lawfully admitted to the United States for permanent residence on September 19, 1967, and had made application to file a petition for naturalization. Odile had been employed by the Department of Employment and Security for the State of Louisiana from January 1968 to August 1969 but at the time of her death she was rearing the three children of her marriage. Bean had permitted Odile and her children to accompany Bernard during his temporary assignments in the Middle East, and at the time of her death she was also accompanying Bernard on his business trip to the United States.

The three children of the marriage of Bernard and Odile Mahfoud, who are the beneficiaries of this action, were born in Louisiana. At the time of the subject accident, the three children were in Beirut under the temporary care of their maternal grandmother while their

parents went to the United States on Bean business. They had traveled to the Middle East on United States passports. Upon the death of both their mother and father, the grandmother has continued caring for the children pending the outcome of this litigation.

Bernard and Odile maintained a permanent home in Metairie, Louisiana, during his station in Beirut, Lebanon for Bean. His payroll check from Bean was deposited into a New Orleans bank account. These facts indicate that Bernard Mahfoud and his wife intended to return to Louisiana at the completion of the then current Bean project in the Middle East, and were Louisiana residents.

The plaintiff herein, Robert F. Mahfoud, is the brother of the decedent Beranard F. Mahfoud and has been legally appointed as adminstrator of the successions of Bernard and Odile Mahfoud, and as legal tutor of his three children by the Twenty-Fourth Judicial Court, Parish of Jefferson, State of Louisiana. The estates of Bernard and Odile Mahfoud have been probated in Louisiana and all assets of the children beneficiaries are in the State of Louisiana.

In contrast, New York's only real contact with the parties is the fact that it was the location of the plane crash. The location of an airplane crash on approach to a scheduled destination can be classified as fortuitous, especially when the crash occurred on the first leg of a trip with Paris as the ultimate destination.

Considering all of the above, we find that Louisiana has the greater interest in having its law applied to damages and that thus Louisiana law is the law which would be applied under New York's conflict of law principles.

We also note that as to Eastern, Louisiana law will also apply on any damage issues.[1] This would be true using New York conflicts of law principles as outlined above. However, this matter was transferred to New York under 28 U.S.C. § 1407 and back to Louisiana under 28 U.S.C. § 1404(a). Using the doctrine that the transferee court would apply the law which the transferror court would have applied, including its conflict of law principles, we would be applying the conflict of law principles of Louisiana. Under *Jagers v. Royal Indemnity Co.*, 276 So.2d 309 (La. 1973), this case actually presents a false conflict of laws question in that, as we have found above, Louisiana is the only state which has a real interest in the application of its law to the damage issue.

For all of these reasons, we hold that Louisiana law is applicable to the determination of damages in this case.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Eastern has moved this court for partial summary judgment seeking to limit its liability to $75,000 per decedent pursuant to the provisions of the Warsaw Convention, as amended by the Montreal Agreement (hereinafter referred to as "the WC/MA"). Actually, plaintiff agrees with Eastern that the WC/MA governs Eastern's liability in this matter. However, plaintiff asserts an entitlement to prejudgment and postjudgment interest over and above the $75,000. Eastern contends that interest, whether in the form of prejudgment interest or

[1] Louisiana law will govern a determination of the amount of damages even though Eastern's liability for such damages is partially limited by the Warsaw Convention as amended by the Montreal Agreement.

postjudgment interest may not be assessed on a WC/MA award, except, possibly to the extent that the interest plus actual proven damages totals no more than a maximum of $75,000.

In responding to plaintiffs' amended complaint on July 30, 1976, Eastern pleaded the limitation of liability of the WC/MA as an affirmative defense to plaintiffs' claims. In September 1978, in the multidistrict litigation, the court granted plaintiffs' oral motion, over Eastern's objections, for the entry of judgment against Eastern on the issue of liability on the basis of WC/MA and orders were signed by the court to that effect. On February 28, 1979, by written motion, plaintiff moved the multidistrict New York court to amend their liability judgment entered against Eastern to permit Eastern to preserve and raise at a later time any defense it had. This motion was granted by order dated May 11, 1979, and incorporated into the court's order of June 1, 1979. Eastern appealed this order and on October 6, 1980 the judgment was reversed by the Second Circuit. See *Windbourne v. Eastern Airlines, Inc.*, 479 F.Supp. 1130 (E.D. N.Y. 1979), *reversed* 632 F.2d 219 (2nd Cir. 1980). Eastern's appeal and the Second Circuit's reversal of the district court were not based on Eastern's denial of the application of the WC/MA to the death of the decedents, but rather on certain deficiencies arising from Eastern's objection to plaintiffs' procedural capacity to prosecute this action. Eastern has now accepted the procedural capacity of plaintiff.[2]

The Warsaw Convention enacted on October 12, 1929 created a uniform body of law pertaining to the rights

[2] Despite references to a lack of procedural capacity in Eastern Airline's response to a Motion for Summary Judgment filed by U.S.F. & G., all counsel agree that this issue was dropped during the multidistrict litigation in New York.

and responsibilities of passengers in international air carriers. The United States became a party to the convention in 1934. On November 15, 1965, the United States denounced the convention because of its low limit of liability for personal injury or death to passengers (approximately $8300). In May 1966, before the denunciation took effect, a new liability system was agreed upon by the United States and foreign air carriers. The Montreal Agreement, as it was known, increased the limitation of liability to $75,000 and created absolute liability of airlines in international travel.

The system of liability known as the Montreal Agreement consists of a collection of documents. These include (1) an agreement signed by each participating airline in which it consents to file a tariff with the Civil Aeronautics Board, to provide 12 months notice of withdrawal of the tariff, and to provide passengers with notice of a new liability; (2) a tariff in which the airline agrees to forego certain defenses which it could have raised under the terms of the Warsaw Convention and waives the limitations of the Convention's Article 22 liability up to $75,000; (3) a notice, commonly on the airline ticket, advising passengers of the possible application of the Warsaw Convention and the $75,000 liability limitation; and (4) an order of the Civil Aeronautics Board approving the tariff. See Kreindler, Aviation Accident Law § 12A.02 (1981).

Plaintiff cites various references to proven damages and statutes regarding the Montreal Agreement in support of the position that the $75,000 was not intended to include interest.[3] However, these references must be con-

[3] These references to provable damages are in the notice to passengers agreed upon at Montreal and printed by Eastern on the tickets issued to plaintiff decedents, a Department of State memorandum entitled "United States Government Action Concerning the

sidered in light of the fact that although Eastern's maximum liability under the WC/MA is $75,000, a plaintiff must still prove his entitlement to at least that amount of damages. Therefore, we do not take these references to proven damages to mean that the allowance of interest on $75,000 was considered by the parties to the WC/MA, and accepted.

The tariff filed by Eastern pursuant to the Montreal Agreement provides in pertinent part: "The limit of liability for each passenger for death, wounding or other bodily injury should be the sum of U.S. $75,000, inclusive of legal fees and costs." Plaintiff argues, with support from *Leppo v. Transworld Airlines*, No. 21770-1973 (S. Ct. N.Y. City, March 10, 1976), that if the Airlines had intended to include interest they would have specifically set it forth as they did with legal fees and costs. We agree with Eastern that the basis for adding interest cannot be the mere failure of the drafters of the Montreal Agreement and tariff filed pursuant thereto to include such a specific phrase including interest in the $75,000. There is no indication that interest was considered by the drafters and specifically included in or excluded from the $75,000 limitation. However, we do not believe, as defendants suggest, that this totally precludes the imposition of interest in certain cases.

Four federal courts have addressed the issue of interest in a WC/MA personal injury/death claim. All four of these cases arise out of the same Eastern flight on which the plaintiff decedents were killed.

In *Distenza v. Eastern Airlines, Inc.*, No. 75-2412 (E.D. La. 1982), the court ruled, without stated reasons, that interest should be allowed under the WC/MA.

Warsaw Convention" dated May 5, 1966; and a press release issued by the Civil Aeronautics Board on May 13, 1966.

In *Hickey v. Eastern Airlines, Inc.*, No. 76-237F (E.D. La. 1981) the issue of interest was never finally adjudicated since the matter was settled. However, Judge Mitchell indicated in proceedings prior to settlement that interest should be allowed on the $75,000 in order for the WC/MA's true intent of providing for absolute liability while expediting matters to be fostered.

This dual purpose was also recognized by Judge Collins in *Windbourne v. Eastern Airlines*, No. 75-715C (E.D. La. 1982). The *Windbourne* court reasoned that the Montreal Agreement contemplated prompt recovery to the passenger from the Airline in return for the maximum damage award limitation and that this purpose was frustrated when litigation continued for 6 years after the crash. Judge Collins also noted that "[a]n additional equitable consideration militating in favor of such award is that airlines would be unjustly enriched if allowed to interminably litigate the issues and withhold from survivors that to which they are entitled by law." Id.

In *Domangue v. Eastern Airlines, Inc.*, 542 F.Supp. 643 (E.D. La. 1982), Judge Boyle denied prejudgment and postjudgment interest. His reasoning was that the intent of Article 22 of the Warsaw Convention as amended by the Montreal Agreement is to limit recoverable damages to $75,000 and thus fix at a definite level the costs to airlines of damages sustained by the passengers and of insurance to cover their damages.

We agree with the court in *Hickey*, *supra*, and *Windbourne*, No. 75-715C (E.D. La. 1982). As the New York court in the multidistrict stage of this case remarked:

> "While one of the central purposes of the Warsaw Convention was to limit the potential liability of a carrier by providing maximum damage recovery . . .

for personal injury or death arising out of an air disaster, this Argus of the aviation industry was not exacted without a price. In exchange for this protection, Article 17 was included to provide that

> "[T]he carrier shall be liable for damages sustained in the event of the death or wounding of a passenger, if the accident which caused the damage sustained took place on board the aircraft or in the course of any operations of embarking or disembarking."

Windbourne v. Eastern Airlines, Inc., 479 F.Supp. at 1140. The Montreal Agreement changed this liability by raising the Airline's limit to $75,000 while at the same time waiving the Airline's Article 20(1) defense under the Warsaw Convention.[4] As the State Department remarked:

> "Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and *expedited*."

Department of State Press Release No. 110, May 13, 1966, as quoted in Id. at 1141 (emphasis added).

It is unconscionable to let an airline delay litigation to an extent that a smaller amount of money may be invested in order to pay a $75,000 claim. The WC/MA was intended for speedy resolution of claims. The plaintiff here has never contested that the WC/MA applied, and, in fact, moved for summary judgment on that issue. That motion was resisted by Eastern on purely procedural grounds which were later withdrawn. Thus, the case is distinguishable from *Domangue* in which the plaintiff resisted the application of the WC/MA after the Second Circuit's decision at the multidistrict level. While we do not hold that in every single instance interest would be allowable, we do hold that in this case prejudgment and postjudgment interest is allowed. We also hold that prejudgment interest is to be allowed from the date of judicial demand at the rate provided for under the Louisiana Civil Code articles.

[4] Article 20(1) of the Warsaw Convention provided that an airline could avoid liability thereunder by establishing that the carrier and his agents had taken all necessary measures to avoid the damage or that it was impossible for the carrier or the agent to take such measure. Thus, under the Warsaw Convention one could speak in terms of "a presumption of liability" while under the Montreal Agreement absolute liability is more to point. See *Windbourne v. Eastern Airlines*, 479 F.Supp. at 1141 and the cases cited therein.

For all of these reasons, we find that Eastern is liable to plaintiff up to the amount of $75,000 for each decedent, inclusive of attorney's fees and costs, plus prejudgment and postjudgment interest.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this the 11th day of November, 1982.

/s/ Nauman S. Scott
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Civil Action No. 75-1291-A

ROBERT F. MAHFOUD, ETC., *et al.*,
Plaintiff

versus

EASTERN AIR LINES, INC., *et al.*,
Defendants

[Filed Dec. 2, 1982]

MOTION AND ORDER FOR LEAVE TO DEPOSIT MONEY INTO THE REGISTRY OF THE COURT

Defendant Eastern Air Lines, Inc., pursuant to Fed. R. Civ. P. Rule 67, moves the court for leave to deposit into the registry of the court the sum of $150,000, and shows:

1—The Court has granted Eastern's motion for partial summary judgment, limiting Eastern's liability in this action to $75,000 per decedent, or a total of $150,000.

2—Although the Court also ordered that Eastern pay interest from date of judicial demand, Eastern has filed a motion for reconsideration of said order, but, reserving all appellate rights, will comply with whatever order the Court issues in disposition of said motion, and will file into the registry of the court whatever additional sums the Court says is due in payment of said interest.

3—Attached hereto is United States Aviation Underwriters' check No. 18027, dated November 29, 1982, in the amount of $150,000, payable to the Clerk, United States District Court, Western District of Louisiana, in satisfaction of Eastern's obligation (pretermitting whatever additional sum may be due pursuant to the Court's disposition of the motion directed to the amount of interest).

/s/ Francis G. Weller
FRANCIS G. WELLER
of
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
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Counsel for Defendants
Phone: 581-5141

[Filed Dec. 3, 1982]

ORDER

The foregoing motion considered, it is

ORDERED that defendant Eastern Air Lines be, and it is hereby, granted leave to file into the registry of the court United States Aviation Underwriters' check No. 18027, in the amount of $150,000.

Alexandria, Louisiana, this 3d day of Dec., 1982.

/s/ Nauman S. Scott
United States District Judge

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: 12/27/82

REPLY TO
ATTN OF: JUDGE NAUMAN S. SCOTT (jh)

SUBJECT: ROBERT F. MAHFOUD, *et al* v. EASTERN AIRLINES, INC.
C.A. No. 75-1292-A

TO: ALL COUNSEL OF RECORD

[Filed Dec. 3, 1982]

MINUTE ENTRY

The motion for reconsideration filed on behalf of Eastern Airlines, Inc. of this court's ruling issued November 11, 1982 is hereby denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Civil Action No. 75-1292

ROBERT F. MAHFOUD, ETC.

—VS—

EASTERN AIR LINES, INC., and
UNITED STATES OF AMERICA

[Filed Apr. 21, 1983]

JUDGMENT

This is an action for damages brought pursuant to 28 U.S.C. §§ 1332, 1346(b), 2671 *et seq.* against Eastern Air Lines, Inc. and the United States of America by Robert F. Mahfoud on behalf of Paul, Mireille and Natalie Mahfoud, the three minor children of Bernard and Odile Mahfoud, deceased.

In a prior proceeding this Court granted a summary judgment finding that defendant, Eastern Air Lines, Inc., is liable, based upon the Warsaw Convention, as amended by the Montreal Agreement, up to the maximum principal amount of $75,000 for each death.

On December 6, 1982 the Court called the case for trial on damages and the trial proceeded with plaintiff and defendant United States presenting evidence to the Court; the Court considered the pleadings of the party and the testimony and evidence properly admissible; from the admissible evidence and the reasonable and

probable inferences to be drawn therefrom, and from the appropriate statutes and the law, the Court issued its Ruling on April 5, 1983, said Rule to be and is hereby made a part of this Judgment as Findings of Fact and Conclusions of Law as provided by Rule 52, Federal Rules of Civil Procedure. It is, therefore

ORDERED, ADJUDGED AND DECREED that the plaintiff be granted and is hereby given a Judgment for damages, resulting from the wrongful deaths of Bernard F. Mahfoud and Odile W. Mahfoud against Eastern Air Lines, Inc. and the United States of America, both being jointly, severally and in solido liable for the judgment, subject, however, to the liability of Eastern Air Lines, Inc. being limited to $150,000 per the Court's Ruling dated November 11, 1982, and the Mahfoud children are awarded and shall recover money damages in the following amounts:

PAUL BERNARD MAHFOUD, individually, the sum of Five Hunrded Fifty One Thousand Six Hundred Sixty Six Dollars ($551,666.00);

MIREILLE MABELLE MAHFOUD, individually, the sum of Five Hundred Eighty Seven Thousand Six Hundred Sixty Six Dollars ($587,666.00);

NATALIE LAROSE MAHFOUD, individually, the sum of Six Hundred Five Thousand Six Hundred Sixty Eight Dollars ($605,668.00).

It is further

ORDERED, ADJUDGED AND DECREED that Eastern Air Lines, Inc. shall pay interest on the above sum and amount as follows: prejudgment interest from December 4, 1975, the date of judicial demand, to September 12, 1980 at the rate of 7%, from September 12, 1980 to

September 11, 1981 at the rate of 10%, and from September 11, 1981 to December 2, 1982, the date of deposit in the Registry of the Court, at the rate of 12%. The United States of America is to bear postjudgment interest from date of entry of this Judgment as provided by 28 U.S.C. § 1961. It is further

ORDERED, ADJUDGED AND DECREED that intervenor, United States Fidelity & Guaranty Insurance Company, is entitled to Twenty Nine Thousand One Hundred Thirty Dollars ($29,130.00) pursuant to a stipulation between parties as reimbursement for workmen's compensation paid; said reimbursement to be owed by the United States of America and Eastern Air Lines, Inc., jointly, severally, and in solido. It is further

ORDERED, ADJUDGED AND DECREED that the defendants, United States of America and Eastern Air Lines, Inc., be given credit, in equal amounts from the above adjudged recovery of each of the Mahfoud children, for the amount paid to United States Fidelity & Guaranty Insurance Company. It is further

ORDERED, ADJUDGED AND DECREED that the sum awarded to United States Fidelity & Guaranty Insurance Company bear interest from date of judgment at the rate provided by 28 U.S.C. § 1961. It is further

ORDERED, ADJUDGED AND DECREED that plaintiff be awarded against the United States of America, in addition to the sums and amounts previously itemized, court costs as assessed by the Clerk of Court.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this the 21st day of April, 1983.

/s/ Nauman S. Scott
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4315

ROBERT F. MAHFOUD, ETC.,
Plaintiff-Appellee,

versus

EASTERN AIR LINES, INC., *et al.*,
Defendants-Third Party Plaintiffs,

versus

EASTERN AIR LINES, INC.,
Defendant-Third Party Plaintiff-Appellant-Appellee,

versus

UNITED STATES OF AMERICA,
Third Party Defendant-Appellant.

[Filed Sep. 29, 1983]

Appeal from the United States District Court
for the Western District of Louisiana

Before CLARK, Chief Judge, RUBIN, and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of the United States of America for an extension of time to order a transcript of the proceedings before the United States District Court on the 6th of December and to supplement the record on appeal with the transcript of such proceedings is GRANTED.

IT IS FURTHER ORDERED that the appellants' briefs shall be filed by October 25, 1983. Appellants may, to the extent they deem suitable, rely on the briefs in Domangue v. Eastern Airlines, No. 82-3515. They may assume that, to the extent the opinion of the panel that heard that case is decisive of any issue raised in this case, the *Domangue* panel opinion will constitute the law of the circuit.

IT IS FURTHER ORDERED that the motion of appellee Robert F. Mahfoud to dismiss the appeal is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4315

D.C. Docket No. CA-75-1292-A

ROBERT F. MAHFOUD, ETC.,
Plaintiff-Appellee Cross-Appellant,

versus

EASTERN AIR LINES, INC., *et al.*,
Defendants-Third Party Plaintiffs

EASTERN AIR LINES, INC.,
Defendant-Third Party
Plaintiff-Appellant-Appellee.

Appeals from the United States District Court for the Western District of Louisiana

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Before REAVLEY, RANDALL and WILLIAMS Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

IT IS FURTHER ORDERED that defendant-third party plaintiff-appellant-appellee pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 8, 1984

ISSUED AS MANDATE:

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

As stated by the appellant, Eastern Air Lines, in its brief, the only issue in this case is:

> Whether interest, prejudgment or postjudgment, over and above the $75,000 maximum limit of damages, is recoverable on a Warsaw Convention/Montreal Agreement judgment.

This issue was settled by this Court in *Domangue v. Eastern Air Lines*, 722 F.2d 256 (5th Cir. 1984). In that case we held that the trial court could award both prejudgment and postjudgment interest in a wrongful death action under the Warsaw Convention and the Montreal Agreement, such interest to be in addition to the $75,000 limited liability of the Convention and Agreement. The award of prejudgment and postjudgment interest by the district court, therefore, was within its authority. The judgment of the district court awarding $75,000 plus prejudgment and postjudgment interest is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL 227

IN RE AIR CRASH AT J.F.K.

United States Courthouse
Brooklyn, New York

September 15, 1978
2:00 o'clock P.M.

BEFORE:

HONORABLE HENRY BRAMWELL, U.S.D.J.

PERRY AUERBACH
Acting Official Court Reporter

[2] APPEARANCES:

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FOR DEFENDANTS PORT AUTHORITY OF NEW YORK & NEW JERSEY

By: JAMES M. BEGLEY, ESQ.

FOR DEFENDANT U.S.A.

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U.S. Department of Justice
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FOR DEFENDANT ROCKWELL INTERNATIONAL

By: GARY FITZPATRICK, ESQ.

[3a] FOR DEFENDANT BOEING

By: BENJAMIN HALLER, ESQ.

• • • •

[4] THE COURT: All right. This case as everyone knows was put over for the parties to get together and see what if anything could be worked out, and you can tell me what the situation is, Mr. Rutherford.

MR. RUTHERFORD: Yes, sir. There was a meeting yesterday between Mr. Alpert, of United States Aviation Underwriters and Mr. William Schaeffer, Deputy Assistant Attorney General for the Civil Division of the Department of Justice.

I'm sorry to report that the problem still exists and it does not seem to be of any immediate prospect of resolution. Accordingly, on behalf of Eastern Airlines today we have filed first of all a motion.

THE COURT: Maybe I ought to get to that subsequently, okay?

MR. RUTHERFORD: Right.

[20] THE COURT: Now, there was a motion filed by the plaintiffs this afternoon. Did the parties have anything to comment on that?

MR. GEOGHAN: Is that on the public administration [21] case?

THE COURT: No. On the Warsaw Convention.

MR. SINCOFF: Yes, your Honor. There are two separate motions that we found. I would like to discuss the first motion which deals with passengers Abbate, Alban-Holquin, Alzozo, Behar, Edmond Bigio, Raphael Bigio, and Omar Daha.

In these passenger cases although the public administrator is the formal administrator of the estate, there is no contest of who represents the next of kin.

THE COURT: I see.

MR. SINCOFF: There is no issue as to it.

Now, the reason for the motion, the motion is prompted in part by the fact that yesterday afternoon Eastern Airlines served offers of judgment in each of those cases. In all of them except decedent—in all seven of these

cases to which the motion relates with the exception of passenger E. Bigio, Edmond Bigio, the offer of judgment was identical and it read in essence pursuant to Rule 68 defendant Eastern Airlines hereby offers to allow judgment to be taken against it in this action by the plaintiff in the amount of $75,000. [22] In the E. Bigio case—Bigio. In the Raphael Bigio, the offer was identical ex-excuse me. I made a mistake. It's R. Bigio, Raphael cept it mentioned the amount $60,000.

I spoke with Mr. Rutherford this morning and inquired of him as to whether the offer of judgment of $75,000 would include interest, exclude interest, or defer decision for a ruling by the Court as to whether pre-judgment interest could be added to the sum of money.

He said that the offer of judgments would include interest, so that acceptance of this offer would constitute a waiver of any claim by a plaintiff in an attempt to collect pre-judgment interest in addition to the Warsaw Convention-Montreal Agreement, damage limitation $75,000.

[23] MR. SINCOFF: (continuing) That offer of judgment was discussed further in an attempt to see if we could have judgment entered for these people against Eastern Airlines on liability only and defer to a later time all other contests which include whether the plaintiff is entitled to pre-judgment interest; if so what and things of that nature.

Unfortunately, we were unsuccessful in resolving that agreement and consequently, we filed this motion.

Under the Montreal Agreement, Warsaw Convention, the airline is liable, without proof of negligence, and consequently these plaintiffs are entitled to have judgment on liability only entered against Eastern and by entry of such a judgment it cannot prejudice subsequent determinations as to any defenses they may have; damage limitation, interest, pre-judgment interest, capacity to sue or whatever they wish to raise.

Consequently, in order to eliminate these passengers from the trial which hopefully will commence on Monday morning, we have asked that judgment be entered against Eastern only on liability only leaving all issues for a later time.

• • • •

[24] That would effectively, in my opinion mean these passengers could then proceed to damage trials against both Eastern and the Government at such time as the Court may set.

THE COURT: Surely. On the motion, Mr. Rutherford?

MR. RUTHERFORD: We received the papers this afternoon. May I assume from Mr. Sincoff this is a Rule 12 motion? He doesn't specify what he is moving under.

MR. SINCOFF: I would ask it be considered as a Rule 12 motion and/or a Rule 56 summary motion.

MR. RUTHERFORD: Insofar as Rule 56, there's nothing attached to it, and I don't see how it could possibly be a Rule 56 with nothing more than a notice of motion.

On a Rule 12 motion, I did not know at this point what the pleadings reveal. It was served on me when I came into court. I think this is a very quick attempt by Mr. Sincoff to get his cases out of trial so he doesn't have to pay cost to the plaintiffs' committee, but I have not had an opportunity to compare the pleadings as to whether or not, in fact, they reflect what he has said.

[25] Furthermore, I'm not sure I agree with all his statements as to what this decides.

THE COURT: What would you have the Court do?

MR. RUTHERFORD: I would request it be put over ten days-two weeks, and allow me to submit papers in opposition if I have any.

THE COURT: What about Monday morning?

MR. RUTHERFORD: Well, your Honor has a lot of projects in store for Monday morning.

THE COURT: This shouldn't be too much of a problem.

MR. RUTHERFORD: Well, I would request further time and if this is to be considered a Rule 56 motion, Rule 56 is quite clear that that is required to be ten days in the rule itself.

THE COURT: How can you best handle this, Mr. Sincoff? What's your suggestion?

MR. SINCOFF: I assume since I was served with the offers of judgment Thursday afternoon that time was of the essence and—

THE COURT: Based on that you went forward?

MR. SINCOFF: Yes. I'm responding to the offer of judgment, defective though it was since it didn't give me ten days notice, but I don't see there's [26] any reason to delay. The offers of judgment, I assume were filed in court?

MR. RUTHERFORD: No. If you are familiar with the rule, the originals are not filed in court under the rule unless you accept it. Of course you are free to accept our offer of judgment right now, and that will end the whole thing, won't it?

MR. SINCOFF: I ask as part of the records these documents that I was served be filed.

MR. RUTHERFORD: The procedure—

THE COURT: Do you have the originals here?

MR. RUTHERFORD: They are in the office, but I can file them Monday morning.

THE COURT: He would like them filed.

MR. SINCOFF: I would like them filed. I think the Court has the power and discretion to set whatever timetable is appropriate under the special circumstances of this case since the offer of judgment was prompted by Mr. Rutherford yesterday afternoon.

I only think it's fair that I be able to respond by this appropriate motion.

I would also say that he desires us to accept the offer of judgment, but as I explained, it is on [27] condition

that the pre-judgment interest be waived and that condition of course, is unacceptable.

MR. GEOGHAN: Although Mr. Sincoff directed his arguments to the non-controversial cases, that is the ones that are not in dispute as to who represents the next of kin—

THE COURT: Two motions.

MR. GEOGHAN: And with respect to the motion, that includes the deceased and next of kin, Peter Schmidt Hansen and Wolfgang Hansen, I call to your Honor's attention there are other cases pending on those same two actions by the next of kin in which we represent the next of kin.

That dispute has not been resolved to this date, and so we would request that liability judgment be entered in those cases as well if the Court is going to direct such entry of judgment.

MR. RUTHERFORD: That's an exact problem, your Honor. I mean, in these cases he says he's moving for judgment on the pleadings, but in all of these cases the issue has been raised that the public administrator is not a proper party.

If your Honor is going to go ahead and enter a judgment for this plaintiff against this defendant, we've got to cross those bridges in spite [28] of the fact that Mr. Sincoff doesn't want to cross them.

That's why I feel this rush is simply to try and bail his cases out from the expenses and we are being forced into putting in a lot of papers without adequately briefing this for your Honor. I think it's wrong.

MR. GEOGHAN: First of all, let me correct Mr. Rutherford. I'm not raising any objections to the cases to which Mr. Sincoff directed his remarks. I think judgment is appropriate at this time in those cases. There's no dispute as to who represents the next of kin in those.

I'm merely directing my remarks to the other motion which covers those cases where there is a dispute and

specifically in cases, Civil 76-563, which is Peter Hansen, and 76-1193, which is Wolfgang Hansen. Those are the civil numbers in the cases that were filed by our office on behalf of the next of kin.

MR. SINCOFF: I haven't yet commented, your Honor, on the companion motion, but since Mr. Geoghan raises, it's the same issue.

We filed a second motion this afternoon [29] dealing with deceased passengers George Alexandridis, Alexandros Hadzis, Peter Hansen and Wolfgang Hansen as well as Cristos Manias, Gerasmos Merkouris, E. Pefanis, and J. Priniotakis.

Each of those passengers and the civil numbers applicable to them appear on the motion. In each of those cases there's a second action that is pending by another attorney.

In the case of Mr. Geoghan, it is in P. Hansen and W. Hansen, the two civil numbers he has entered into the record.

I want to make it clear that although the grounds are identical to the first motion, there is no opposition to the second motion by Mr. Geoghan. The only opposition is by Eastern Airlines. Mr. Geoghan is joining in the motion.

MR. GEOGHAN: You misunderstand me, Mr. Sincoff. If judgment is going to be entered in these cases where it's O'Rourke, the public administrator, I request that judgment be entered in the other cases in which we directly represented the next of kin. I don't oppose to this—

MR. SINCOFF: I was trying to say it, but you said it better.

[30] MR. GEOGHAN: I didn't say it better, but more completely.

MR. SINCOFF: Interpretation of deferring this I urge the Court not to. Mr. Rurtherford suggests I have some evil motive of attempting to avoid compensation on the committee which I serve. I would say that's ludicrous. On the merits we are entitled to judgment.

If he has any defense, any defense, entry of judgment is not going to prejudice that defense.

THE COURT: Anything further, Mr. Rutherford?

MR. RUTHERFORD: I would point out on the second motion there are other cases besides Mr. Geoghan which is obviously there's a contest as to whether Mr. O'Rourke is a proper administrator. I don't think it's really proper to deal with that motion without notice having been given to counsel.

THE COURT: You may be right as to those cases. There are other counsel who are involved.

MR. SINCOFF: I would suggest that the other counsel in the companion cases to these where there are two actions for each decedent, one by the public administrator—

[31] THE COURT: Yes?

MR. SINCOFF: They can't be prejudiced by entry of a judgment in favor of the public administrator in his action against Eastern Airlines. We certainly, are not going to take that judgment and proceed to trial on damages. If we were to do so, certainly—

THE COURT: So they won't be prejudiced and judgment is entered similar to entry of judgment for these—

MR. SINCOFF: Your Honor can do that, enter a judgment in the companion cases on liability only. Your Honor can consolidate them. We have no problem whatsover. We are not, at this point, by applying for and the Court granting this motion. We are not rushing across the street to try damages because that issue is also before your Honor.

Your Honor has ample judicial control over the matter of damages.

MR. GEOGHAN: My concern goes beyond that and I don't want to get into a dispute publically with Mr. Sincoff.

If judgment is entered in those cases where the public administrator represents the next of kin who [32] are thousands of miles away and where there is a dispute as

to whether he either properly represents them or that they even want him to represent them, entering judgment in those cases, I think without notice to all of the attorneys—I have notice because I happen to be sitting here—I think would be perhaps forcing your Honor into error.

I don't want to see that occur. I think your Honor's suggestion or Mr. Rutherford's suggestion—I'm not going to agree with Mr. Rutherford on many things in this trial, but I agree with him on that; that there should be at least some notice to the other attorneys. There's no rush to enter judgment in those cases. I'm a little concerned there is such a rush in those cases. We are not going to damage trials. Perhaps the next of kin may want their own judgments entered.

MR. RUTHERFORD: I would point out to your Honor, too, these cases have been pending for over two years, and at any time Mr. Sincoff could have made this motion. To wait to the Friday afternoon before the trial starts, I think is returning the thing. I really don't see whether, if his positioning is correct, whether it matters [33] the judgment gets entered today, Monday or a week from Monday.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL 227

IN RE: AIR CRASH DISASTER AT JOHN F. KENNEDY INTERNATIONAL AIRPORT ON JUNE 24, 1975

United States Courthouse
Brooklyn, New York 11201

September 18, 1978

Before:

HONORABLE HENRY BRAMWELL, U.S.D.J.

GENE RUDOLPH
Official Court Reporter

[2]

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[4] THE COURT: I want to first note for the attorney, voir dire question, 4A, has been revised to generally reflect the definition of approximate cause employed by the New York pattern. Jury instructions, that is "In very general terms 'approximate cause' means that the defendants' negligence was a substantial factor in bringing about the crash". That is the only item I have to tell.

All right. Are you ready for trial, Mr. Granito and Mr. Sincoff?

MR. SINCOFF: Yes, but I believe before you do, we have to bring this passenger list that you are going to read to the jury up to date.

THE COURT: All right.

MR. SINCOFF: We presented your Honor on Friday, I believe it was, or early last week with a list of passengers against Eastern Airlines and there were 57 names listed. On Friday, the Court granted the motion dealing with seven passengers and they should be deleted from the list, they are Nos. 1, 2, 4, 7, 8, 9 and 10.

In addition, on Friday, there were two cases which were settled, Nos. 33 and 34, and I believe [5] counsel, that would leave a balance of 48 cases as of this moment.

I believe there are attorneys present who have oral applications.

MR. BENJAMIN: Good morning, your Honor, may it please the Court, would the Court entertain an oral motion to grant Summary Judgment on liability in Civil Action 75-C-572, Edgar A. Bright vs. Eastern Airlines, et al. We would ask the Court to enter judgment on the issue of liability and in the matter entitled Maunsel—

THE COURT: Is that Edgar Bright?

MR. BENJAMIN: Yes, that is Passengers 10 and 11.

THE COURT: Right.

MR. BENJAMIN: The second motion deals with Civil Action 75, 573, Maunsel Hickey, et al. vs. Eastern Airlines—et al. and ask the Court to grant—

THE COURT: That is J. Hickey and M. Hickey?

MR. BENJAMIN: Yes.

THE COURT: All right.

Mr. Rutherford?

[6] MR. RUTHERFORD: We oppose it, your Honor. I don't know what he is moving under or what the basis of his motion is and I haven't seen any papers and I haven't been given an opportunity to respond. We oppose it.

MR. BENJAMIN: The basis of our motion, your Honor, is that these cases are governed by the provisions of the Warsaw Convention, where the issue of liability is not an issue once the fact of accident has been proved and I believe the stipulation in this case agrees that an accident did occur.

THE COURT: Did you have anything on this, sir? Anything further, Mr. Rutherford?

MR. RUTHERFORD: May I ask under what rule this motion is being made?

MR. BENJAMIN: Pursuant to the same rules which were applied to the motions on behalf of the claimants on Friday, your Honor.

THE COURT: Anything further, Mr. Rutherford?

MR. RUTHERFORD: I would like the rule specified, your Honor, because I think we will go to the Second Circuit on this and I think the record should be clear under what rule this relief is going [7] to be granted.

MR. BENJAMIN: Well, your Honor, the rule which deals on judgement on the face of the pleadings I believe is Rule 12 and the rule for Summary Judgment, I believe is 56.

THE COURT: Anything further?

MR. RUTHERFORD: Yes, we oppose it on the grounds that under those rules that the plaintiff is not entitled to judgment.

THE COURT: All right. The application is granted and case—, passenger No. 10, Edgar Bright, Passenger 11, Ethel Bright, Passenger 34, J. Hickey and Passenger 35, M. Hickey, will be deleted from the cases which are read to the jury.

MR. JOBE: Good morning, your Honor. I would like to make the same verbal motion as Mr. Benjamin and Mr. Sincoff on behalf of clients that I represent and are listed on this passenger list, pending.

The basis of this motion is the same as Mr. Benjamin, Rule 12 and Rule 56, and in that these are Warsaw Montreal cases and the cases that I would like to move for an entry of judgment on liability are the Domangue case, Civil Action 76, 241, which [8] would remove, passenger No. 26, B. Domangue, and LePetit, Civil Action No. 76-258, and a companion case, J. Millas, Civil Action 76-1916, which would remove No. 38, Passenger P. LePetit.

I also would like to move for a judgment in the Winbourne case, which is Civil Action 76-237, removing the passengers on the passenger list, 55, 56 and 57.

THE COURT: Anything on that, Mr. Rutherford?

MR. RUTHERFORD: Yes, sir. We oppose an oral application and we request that papers be submitted and we be given time to respond.

THE COURT: All right. The motion is granted as to No. 26, B. Domangue. As to 55C, Winbourne, as to 56, P. Adamanto Winbourne and as to 57, Amie Winbourne.

MR. JOBE: Your Honor, the only other thing was this J. Malass, it is not listed but it would be the same as 38, the passenger would be.

THE COURT: That is 76-C-1016.

MR. JOBE: Yes.

THE COURT: The application is granted as to that proceeding.

Are there any disputes as to the administrators?

[9] MR. BENJAMIN: No, your Honor.

MR. JOBE: No, your Honor.

MR. GEOGHAN: If your Honor please—

MR. RUTHERFORD: Just so the record is clear on LePetit, there are two people claiming to be beneficiaries in two separate lawsuits and we have raised an issue as to the proper party.

MR. JOBE: Plaintiff contends that both of these individuals, the mother and the wife, under the applicable laws of Louisiana and France have a right to recovery and that is why two lawsuits were filed.

THE COURT: Thank you, Mr. Jobe.

MR. GEOGHAN: If your Honor, please, on passengers that are listed on this list, Nos. 31 and 32, P. Hansen and W. Hansen, which respectfully are Civil Trial No. 76-255 and 76-256, these are two of what I would characterize as the controversial cases where there is a dispute as who to represent—

THE COURT: As to representation?

MR. GEOGHAN: Yes.

THE COURT: Is there any dispute as to applicability of the Warsaw Convention?

[10] MR. GEOGHAN: No dispute on that at all, your Honor. I am at a loss and if your Honor feels it can be done, then I certainly would move to enter judgment, but I don't see really how we could enter judgment on behalf of the public administrator for the same parties and also enter judgment on behalf of the personal representative of these parties at the same time.

So, I would suggest that we merely, for the purpose of this trial since this trial is not necessary so far as these parties are concerned, that these names not be referred to to the jury.

I am sure Mr. Rutherford will have no objection as to that and that any judgment be deferred until the dis-

pute as to who properly represents these parties has been resolved.

THE COURT: Is that 31, 32, P. and W. Hansen?

MR. GEOGHAN: That's correct.

THE COURT: You would suggest they not be referred to the jury?

MR. GEOGHAN: That's correct, because it has been suggested to me if they are, these people might be subjecting themselves to trial costs and certainly I don't want to subject them to that [11] merely because their names are being mentioned to the jury.

THE COURT: Mr. Rutherford, anything on this?

MR. RUTHERFORD: I don't understand the application. I mean, are you contesting his right to the judgment?

MR. GEOGHAN: O, yes. I am suggesting—not suggesting, these matters—well, I am suggesting that it would be inappropriate to enter judgment on the same cases twice, once on behalf of one set of parties and on the other hand on another.

MR. SINCOFF: I think the solution is obvious and that is, I think judgment should be entered for each passenger in all of the cases, without prejudice to a subsequent determination as to representation.

THE COURT: Proper representation?

MR. SINCOFF: Yes.

The people are entitled to a liability—

THE COURT: Do you represent someone in the Hansen case?

MR. SINCOFF: P. Hansen, as the list shows, we represent the public administrator, 76-255, Mr. Geoghan represents the contesting party for the [12] same passenger in 76-563. One passenger.

So, I would suggest that we have liability judgment entered against Eastern without prejudice to an effect upon the representation issue which will be decided at a later time.

MR. GEOGHAN: I don't understand the rush for this, but perhaps if we have this understanding that Mr. Sincoff consulted with his client, the public administrator and advise him that judgment has been entered and we will consult with the parties and advise them that judgment has been entered on their behalf. I don't see the necessity for it but if you want to do it that way, I have no objection.

MR. SINCOFF: Thank you.

THE COURT: All right. Mr. Rutherford?

MR. RUTHERFORD: I oppose the application on the ground that I don't think anybody is entitled to a theoretical judgment. Either you are an appropriate party plaintiff suing me and therefore entitled to a judgment in your favor or were not entitled to any judgment and therefore I oppose the application.

THE COURT: Mr. Rutherford, would it be all right with you if the Court didn't read these [13] names in connection with the list of plaintiffs to be read to the jury? Would that be all right with you?

MR. RUTHERFORD: We are talking now—

THE COURT: 31 and 32, P. and W. Hansen.

MR. RUTHERFORD: Well, I think if they are going to be bound by the case and your Honor is going to read the other names, I see no reason why these two names shouldn't be read, also.

MR. GEOGHAN: May I have a moment, your Honor?

MR. RUTHERFORD: If your Honor is going to read 31 names as far as I am concerned you might as well read 33 names.

THE COURT: Mr. Geoghan and Mr. Sincoff, the Court's position is that judgment should not be entered at this time. What do you say about the reading of these names?

MR. GEOGHAN: I have no objection if the names are read to the jury but to suggest that because those names are read that they would be required to pay court

costs and attorney fees for a case that they don't need tried. They have got their judgment against the judgment. They have got their $75,000 against Eastern Airlines, and to [14] suggest that these people, because their names are going to be read to the jury, may be bound—well, I think it is ludicrous.

If there is an understanding that these parties would not be subject to any attorney fees, I have no objection to their names being read. I don't think anybody is pressing that.

MR. SINCOFF: It is perfectly fine with me but when Mr. Geoghan says these people have judgment and already have 75,000, that is not true. That is why we are trying to enter judgment. As far as I am concerned, whether the names are read or not read and if they are not subject to the cost, I think that would be fine.

MR. GEOGHAN: I have no objection, then.

MR. GRANITO: It seems to me this is a matter that can be resolved by the trial committee and I agree with Mr. Geoghan that it would be ludicrous to expect parties in this situation, whether they are his clients or anybody else's clients, to be considered true participants in this trial for the purpose of cost.

THE COURT: Anything, Mr. Rutherford?

MR. RUTHERFORD: I am not involved in the [15] fight among plaintiffs as to who gets what costs and attorneys fees—

MR. GEOGHAN: I don't like that term "fight".

MR. SINCOFF: I agree, your Honor.

THE COURT: What do you want me to do, then, include them?

MR. GEOGHAN: I think that has been agreed to by all parties and I have no objection to it by the understanding that is on the record here.

THE COURT: Is there anything as to these, as to the Hansens, P. and W. Hansen being subjected to cost? Is there any position you take in regard to that?

MR. RUTHERFORD: Yes, sir. If there is a verdict in favor of defendant Eastern Airlines, I would consider them as their two suits or four suits brought on their behalf as a suit in which costs would be taxed.

MR. GEOGHAN: I wasn't referring to those costs. That is no problem. If they lose this case and have to pay court costs, I am not concerned with that. I was concerned with trial costs. That is no problem.

[16] THE COURT: All right, it would appear then that the balance, 39 names of passengers will be read to the jury. Is that correct?

MR. FARRELL: I have a couple more, your Honor.

I move for a liability judgment against Eastern Airlines under the Warsaw Convention Montreal agreement in the following cases, the first one, your No. 5 on the list, it is entitled McLean against Eastern, the decedent is Andre, 75-Civil-1969.

The second one is Joseph Andre against Eastern Airlines, 75-Civil-1970 and that is No. 6.

The third one is No. 37, Marguerite Jacobson, the plaintiff and that one is 76-Civil-455 and the last one includes two decedents on our list, 39 and 40, and the plaintiff is Robert Mahfoud and that is 76-Civil-457.

THE COURT: Now, as to some of these cases, is there controversy as to the proper representative?

MR. FARRELL: There are two Andres who have filed, one is the mother and one is the father and both are beneficiaries under Louisiana law.

I represent only the father Joseph Andre.

[17] THE COURT: So there is controversy on the Andre cases?

MR. FARRELL: I don't believe it is a controversy, two beneficiaries have filed separately. They are divorced.

THE COURT: But they have both filed?

MR. FARRELL: Yes, but I only represent one of them.

THE COURT: So, there is controversy there.

MR. FARRELL: Well, I wouldn't consider it a controversy since they are both beneficiaries under Louisiana law, the mother and father are entitled to recovery for the death of a child.

THE COURT: So, you say as to none of your cases is there any controversy?

MR. FARRELL: I contend that.

THE COURT: Mr. Rutherford, anything as to these matters that have been brought up?

MR. RUTHERFORD: Eastern Airlines opposes the motion, Judge, on the ground that we believe it should be on written papers and we should be given an opportunity to respond and we do not feel that this type of motion falls within Rule 12 and Rule 54 as presented and, furthermore, I don't [18] understand with respect to this last request, if Mr. Farrell says he doesn't represent one of the Andres, how can he move for judgment. He isn't even the attorney.

MR. FARRELL: I think Mr. Rutherford is doing his best to confuse us all. I do represent Joseph Andre, 75-Civil 1970.

THE COURT: But you do not represent the mother?

MR. FARRELL: I don't even know what the mother's case is. It is not even filed in this court—

THE COURT: Was it filed in Louisiana?

MR. GARRELL: It is filed in Louisiana.

THE COURT: Well, there are several cases on this list. For S. Andre there seems to be two and for M. Andre there seems to be four. That is the list of—

MR. RUTHERFORD: And in what cases is judgment being entered, is it being entered in all four cases?

THE COURT: As to these Andres, maybe I may have to defer any action at this time.

MR. FARRELL: Well, your Honor, I represent [19] No. 5, which is actually the plaintiff S. McLean and the passenger—I am sorry, No. 6, the plaintiff S. McLean and the passenger was Andre.

I represent No. 5, which is an Andre case and I represent—

THE COURT: But the other case is listed under the Andres are not your cases?

MR. FARRELL: No, your Honor.

THE COURT: Under those circumstances, I wouldn't grant your motion.

MR. FARRELL: On Andre?

THE COURT: For the Andres, yes.

MR. FARRELL: All right, your Honor.

THE COURT: But as to A. Jacobson, B. Mahfoud and O. Mahfoud, those are the other three that you have requested judgment?

MR. FARRELL: Yes, your Honor.

THE COURT: Anything further on that? Those, Mr. Rutherford?

MR. RUTHERFORD: Nothing further.

THE COURT: As to A. Jacobson, No. 37, the motion is granted, B. Mahfoud, 39, the motion is granted, and as to O. Mahfoud, 40, the motion is granted and as to the 5 and 6, the Andre cases, [20] the motion is denied without prejudice at this time.

MR. FARRELL: Thank you, your Honor.

THE COURT: Any further applications on these passengers?

All right—

MR. RUTHERFORD: Your Honor, could we clarify one point and we don't have the benefit of the record but in the disputed cases that Mr. Sincoff moved on Friday, our notes indicated that your Honor said that the motion was granted but apparently Mr. Geoghan and Mr. Sincoff had some doubts about that.

Could we clarify that as to whether or not that motion was granted so we know whether these names should be included in the list or not?

THE COURT: It was denied as to the disputed cases on Friday, Mr. Rutherford.

Anything further?

MR. GEOGHAN: That is my recollection.

THE COURT: Mr. Sincoff?

MR. SINCOFF: I agree, your Honor. I believe that leaves 36 passengers' names—

THE COURT: That would leave 36, that's [21] correct. As to all of the cases this morning for which the Court has granted the motion for judgment, all of the attorneys will settle an order on notice. Settle an order to that effect on all of the cases for which the Court has granted judgment.

MR. FARRELL: I am not acquainted with this list that you have, your Honor.

THE COURT: Yes.

MR. FARRELL: I don't want the two Andre cases, they are small cases and they are entitled to a Warsaw judgment—

THE COURT: Well, I am not going to give it to you.

MR. FARRELL: All of these that say Farrell, I do represent. These cases were filed in both Louisiana and New York. Louisiana cases were transferred to New York and given one of your numbers here. That is the reason for double numbers on two of these and Mr. Pennington is the representative of a Mrs. Andre.

THE COURT: As to the cases where there is some dispute as to the proper representative, I would suggest that you move on papers.

MR. FARRELL: All right, sir.

[22] THE COURT: Now, are we ready to proceed, gentlemen?

MR. SINCOFF: Yes, your Honor.

THE COURT: Mr. Rutherford, anything further?

MR. RUTHERFORD: No, your Honor.

THE COURT: All right.

Bring up the jury.

[23] (The jury was duly sworn by the Clerk of the Court)

(sidebar discussion)

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS,
CLERK

(5)

No. 83-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.,
Petitioner,

v.

ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1807

EASTERN AIR LINES, INC.,
Petitioner,

v.

ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The amicus curiae in this case have been given permission to file this brief by written consent of counsel for petitioner and counsel for respondent. The amicus curiae support the position of the respondent.

Each year, thousands of Americans engage in international travel. Thousands more foreign passengers ride on American carriers in international travel. In each case, if

the flight departs from, arrives at or has a stopover in the United States, the provisions of the Montreal Agreement, a "special contract", often unknown to them, apply in case of an accident. Once an accident occurs and the passengers or their survivors learn of the provisions of the Montreal Agreement, they reasonably expect prompt settlement of their claims at the time when the funds are most needed. All too often, however, the airline engages in dilatory tactics delaying payment, in some cases, for years. The survivors of deceased passengers, and injured persons, are, thus, severely prejudiced and their ultimate recovery diminished below the contract limit.

The following amicus curiae are the surviving family members or personal representatives of deceased passengers who were killed while engaged in international travel in the accidents referenced above each listing:

1. In the litigation captioned *In Re Korean Air Lines Incident of September 1, 1983;* MDL 565; pending in the United States District Court for the District of Columbia:

Dina Avecilla	CA No. 84-2395
Robert M. Boyar	CA No. 84-0331
Robert M. Boyar	CA No. 84-0332
Mildred Burgess	CA No. 84-1358
Benigno S. Cruz	CA No. 84-2673
Michel De Massy	CA No. 84-2698
Philomena Dooley	CA No. 83-2793
Lois Dorman	CA No. 84-2678
Gerard Lear	CA No. 84-2350
Eric W. Forman	CA No. 83-3587
Olga Hjalmarsson	CA No. 83-2940
Robert Ho	CA No. 83-2794
Ho Yan Chee	CA No. 83-3007
Shirley Katz	CA No. 84-1707
Feng Lam Lim	CA No. 84-1377

Injie Lin	CA No. 83-3890
Lam Lap Chi	CA No. 83-3678
Steven Lee Kwok Wai	CA No. 34-0133
Julia Ann Lombard	CA No. 83-3204
Maureen M. Lombard	CA No. 83-3154
Kathryn J. McDonald	CA No. 84-1708
Marsha J. K. Maikovich	CA No. 83-3792
Mary Dee Martoche	CA No. 83-3891
Mary Dee Martoche	CA No. 84-1710
Gerald David Metcalf	CA No. 84-2646
Ok Ja Chung Sheen	CA No. 84-0542
Nan M. Oldham	CA No. 83-3889
Edwardo Ocampo	CA No. 83-2941
David Eustace Powrie	CA No. 83-3177
Juneto T. Putong	CA No. 83-3588
Carole Moreau-Robert	CA No. 84-2697
Mayuree Siripoon	CA No. 83-3289
Georgia Vlassopoulos	CA No. 84-2351
Terry Tai Li Weng	CA No. 84-2672
Fred Wyler	CA No. 83-2792
Sandra Baker Yoon	CA No. 84-2858
Fan Fong Yuen Cho	CA No. 84-1709
Parveneh S. Zareh	CA No. 83-3793

2. In the litigation captioned *In Re Air Crash Disaster at Covington, Kentucky of June 2, 1983;* MDL 569; pending in the United States District Court for the Central District of California:

Gerald Bouchard	CA No. 84-3796
James Arthur Burgess	CA No. 84-4010
Cranfill H. Cox and Louise M. Cox	CA No. 84-3793
Philip Francis Doyle	CA No. 84-3794
Alex Drdul	CA No. 84-3883
Herman W. Epprecht	CA No. 84-4072
Stewart Gary Esdaile	CA No. 84-3891
Barry S. Flower	CA No. 84-3795

Jonathan A. Gussman	CA No. 84-3798
Robin Elliott Helston	CA No. 84-3884
Cecilia M. Korycki	CA No. 84-4022
Marion J. Lambert	CA No. 84-3890
George Curtis Mathes	CA No. 84-4021
Brenda June Mayne	CA No. 84-3674
Ross W. Nicol	CA No. 84-3889
Wolf Dieter Pohl	CA No. 84-3894
Salah E. Rahal	CA No. 84-3888
Godfrey Allan Roeher	CA No. 84-3847
Stanley A. Rogers	CA No. 84-3887
Audrie M. Ruttan	CA No. 84-3797
Thomas A. Spruston	CA No. 84-3892
Elsie L. Vokey	CA No. 84-3893

INTRODUCTION AND SUMMARY OF ARGUMENT

The essential issue presented to this Court in this case is whether prejudgment interest can be awarded to a passenger in international air travel, or his survivors, for the delay in payment of damages for personal injury or death even if the addition of prejudgment interest increases the amount paid by the carrier such that it exceeds the contractual limit established by the Montreal Agreement, a "special contract" permitted under the provisions of the Warsaw Convention. The Warsaw Convention, a multi-national air carriage treaty, was adhered to by the United States in 1934. As a result of ongoing and pervasive dissatisfaction with the treaty subsequent to its ratification, the Johnson Administration denounced the Warsaw Convention in 1965, with the cancellation of American participation to become effective on May 15, 1966. In a desperate attempt to prevent the U.S. government's withdrawal from Warsaw, which would nullify many benefits received thereunder by international air carriers, the carriers agreed to a "special contract", allowed under the treaty, which raised the limitation on liability for personal injury or wrongful death to

$75,000.00 inclusive of attorneys' fees and costs ($58,000.00 exclusive of such fees and costs) and provided for absolute carrier liability without proof of fault or negligence. Two days before the denunciation of the Warsaw Convention was to become effective, it was withdrawn.

The provisions of the Montreal Agreement relevant here became a part of each air carrier's tariff which must be filed with the Civil Aeronautics Board before it is permitted to operate in American airspace and, by virtue of such filing, becomes a part of each airline-passenger contract.

1. (a) The history of the Warsaw Convention reveals two distinct objectives envisioned by the drafters and signatories: to create uniformity in documentation in international air travel and to limit international carriers' potential liability in case of an accident. The goal of uniformity and the treaty provisions implementing that goal are not revelant here. This case involves the scope of the limitation of air carriers' liability.

The drafters of the Warsaw Convention included a provision that an air carrier's liability for personal injury or death in international transportation would be limited to 125,000 Poincare francs. However, in the same paragraph of the same article, the drafters acknowledged that the limit could be increased by agreement through a "special contract". No maximum level was set at what the increase could be. No discussion regarding the allowance or denial of prejudgment interest appears. The intent of the drafters of the Warsaw Convention in its original form is complied with if any increase of the $8,300.00 is within the reasonable expectations of the parties.

(b) Subsequent to the ratification and effectiveness of the Warsaw Convention, dissatisfaction with the amount of the monetary limits became widespread. In an attempt to remedy the complaints of many member nations, an international conference was called at The Hague in 1955

to amend the Warsaw Convention. One of the major concerns of the delegates at The Hague was to increase the carriers' liability. However, it became increasingly clear that the focus had also shifted to guaranteeing that the claimant received this recovery promptly after the accident. Thus, the Hague Convention adopted a provision doubling the Warsaw limit and providing for the addition of attorneys' fees and costs to be awarded the claimant, at the court's discretion, in excess of the carrier's specified monetary limit unless the carrier had offered a like amount in writing within six months after the accident.

The amendments to the Warsaw Convention drafted during the Conference became known as the Hague Protocol, which has never been ratified by the United States, but which has been adhered to by 78 nations.

(c) Growing discontent in the United States for the low limitation on liability contained in the Warsaw Convention led to the Administration's denunciation of the treaty in 1965, to become effective six months thereafter. In an attempt to prevent American withdrawal from the treaty, an international conference was held in Montreal. At that conference, dual purposes emerged: to increase the limit of liability and to encourage speedy disposition of claims. The latter goal was to be achieved by imposing absolute liability on the carrier so that the settlement of claims would not have to await lengthy accident investigation. The conference ended inconclusively, although the stated objectives and goals are clear from the record.

(d) As a direct result of the inability of the conferees at Montreal to achieve a resolution, and of the fear of both international and domestic carriers that implementing the denunciation of Warsaw would lead to the demise of its numerous tangible benefits, the carriers approved the Montreal Agreement, which provides for an increase in the carriers' limitation of liability and imposition of absolute liability. The requirement of absolute carrier liability is a

direct response to the concerns evidenced at The Hague, and again at Montreal, that claimants should be provided prompt, full recovery.

The Montreal Agreement is a "special contract" permissible under the Warsaw Convention and must conform to the intents of the drafters of the treaty. It fully does so inasmuch as it was within the expectations of the drafters that the carriers could raise their limitation *ad infinitum*, if they so chose. The Montreal Agreement, however, is not a treaty in and of itself. It is a contract that is a part of the airline-passenger contract and should be interpreted under ordinary contract law, acknowledging the reasonable expectations of the parties and adopting the remedies ordinarily available for breach, including prejudgment interest.

(e) In drafting the Montreal Agreement, the United States government negotiated on behalf of passengers in in international travel. The carriers negotiated for themselves and were intimately involved in each step of the drafting and ultimate agreement. It was patently clear to all parties that the purpose of the absolute liability provision was to encourage prompt disposition of claims.

Air carriers have the sole power to unilaterally thwart this objective of the Montreal Agreement through delay in the payment of the Montreal limit. Such delay is a material breach of the Montreal Agreement, which breach can be remedied through the sources acknowledged in ordinary contract law, including the imposition of prejudgment interest. Award of prejudgment interest in these circumstances does not contravene the objectives of the Warsaw Convention. The desire to obtain certainty is satisfied because both the principle recovery and amount of prejudgment interest are readily calculable.

2. The Warsaw Convention/Montreal Agreement provides for essentially liquidated damages. The treaty itself specifies which law is to be applied to the measure of damages. The specific amount due to an individual claimant is easily ascertained by reference to such external standards as the decedent's age, income and family circumstances.

It is a simple exercise for the carrier to determine whether the death damages equal or exceed $75,000.00. Prejudgment interest is permitted as a matter of right when damages are liquidated or reasonably measurable by a fixed external standard.

3. The Warsaw Convention/Montreal Agreement limitation on liability provisions are akin to insurance contracts which provide for policy limitations. An award of prejudgment interest in a Montreal Agreement case which results in a payment by the carrier in excess of $75,000.00/$78,000.00, as appropriate, is therefore analogous to an award of prejudgment interest imposed against an insurer in excess of its policy limits. The modern approach permits the imposition of prejudgment interest against an insurer even if it exceeds its policy limits.

4. Under the Montreal Agreement system of absolute fault, a claimant has an automatic right to receive damages if (a) the flight is international; (b) if the accident took place during operation of the aircraft or during embarking or disembarking; and (c) if the passenger did not contribute to the accident. These requirements are easily ascertainable. Once they are met, the passenger has a legitimate claim of entitlement to provable damages up to the limit. As such, the passenger has a judicially cognizable property right. Interference with that property right by delaying payment exposes the carrier to the imposition of prejudgment interest.

5. Equitable and compensatory considerations are a proper inquiry in contract cases. Permitting prejudgment interest deters attempts by the debtor to benefit unfairly from delay, promotes early settlement where liability is clear, provides just compensation for the claimant, and implements governing considerations of fairness. Each of these salutory goals will be achieved by permitting prejudgment interest in this case. Indeed, the specific objective envisioned by the Montreal Conference which led directly to the Agreement, i.e., speedy disposition of claims, will be fostered.

If prejudgment interest is not allowed, the reasonable expectations of the participants in the Warsaw Convention, the Montreal Conference and the Montreal Agreement will be nullified. The carriers party to the Montreal Agreement had the reasonable anticipation that they were expected to settle claims quickly at an amount of some certainty. They have the option of establishing that certainty by depositing the funds into the court as soon as a judicial demand is made. They may also calculate with certainty any prejudgment interest by ascertaining the fixed rate of interest for the amount of time of delay.

If prejudgment interest is not awarded, then the claimant's recovery, which the parties to the Warsaw and Montreal Conventions envisioned as automatic and prompt, is diminished. Correspondingly, the carriers are required to pay less than the limit, which the parties to Warsaw and Montreal expected them to pay, since they have economically benefited from the wrongful use of the money during its detention.

ARGUMENT

I. THE HISTORICAL PERSPECTIVES OF THE WARSAW CONVENTION AND MONTREAL AGREEMENT INDICATE THAT THE EXPECTATIONS OF THE PARTIES AND PURPOSES OF THE TREATY/AGREEMENT PERMIT AWARD OF PREJUDGMENT INTEREST

The Warsaw Convention[1] is a treaty of the United States[2] which has been supplemented pursuant to Article

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[1] The official title of the Warsaw Convention is The Convention for Unification of Certain Rules Relating to International Transportation by Air, *done* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 *note* (1982).

[2] The United States adhered to the treaty after Senate approval by voice vote and Presidential Proclamation in 1934. Proclamation of the President of Oct. 29, 1934, 49 Stat. 3000-13. American adherence to the Convention was lodged in Warsaw on July 31, 1934.

22(1) of the treaty by a "special contract" of non-treaty status between private parties known as the Montreal Agreement. In order to ascertain the scope of the Convention and the Montreal Agreement, and thus determine whether prejudgment interest is permitted thereunder, the history of the treaty, the negotiations involved, and the practical constructions adopted by the parties, including the evolution and acceptance of the Montreal Agreement must be examined. *See, Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943). *See also, Harvard Research in International Treaties*, 29 Am. J. Int'l L. Supp. 937, 938 (1935); *Restatement (Second) of the Foreign Relations Law of the United States*, §§ 149, 150 (1965).

The Warsaw Convention was the culmination of drafting conferences held at Paris in 1925 and Warsaw in 1929. The United States did not participate in the conference, but sent an official observer.[3]

The Warsaw Convention created uniform rules governing the air carriage of passengers, baggage and cargo, and implemented a liability limitation scheme whereby the burden of proof on liability shifted from the passenger to the carrier in exchange for a monetary limit on damages recoverable. Two distinct goals emerged from the Convention. The first established uniformity of documentation and proce-

[3] The definitive and detailed history of the Warsaw Convention, the later Hague Conference and Protocol, and the Montreal Agreement was published by Andreas F. Lowenfeld, the Chairman of the United States Delegation to the Montreal Conference in 1966, and Allan I. Mendelsohn, a delegate to the Conference. Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) [hereafter cited as Lowenfeld and Mendelsohn]. The history of the Warsaw Convention and the Montreal Agreement is also set forth in *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir. 1983); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 326-27 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *Hernandez* v. *Air France*, 545 F.2d 279, 283 (1st Cir. 1976), *cert. denied*, 430 U.S. 950, 97 S.Ct. 1592, 51 L.Ed.2d 800 (1977).

dures for claims arising out of international air travel. The second limited the potential liability of the carrier in the case of accidents. In case of personal injuries or death, the limit was 125,000 Poincare francs [Article 22(1)], approximately $8,300. The carrier was presumed liable for the injuries or death [Article 17], although it could avoid liability by demonstrating that it had taken "all necessary measures to avoid the damage, or that it was impossible . . . to take such measures" [Article 20(1)]. At the time of its drafting, the limitation of liability provision was deemed necessary for the protection of the fledgling carriers in an enterprise then considered dangerous because carriers were unsure of obtaining insurance coverage. Lowenfeld and Mendelsohn, *supra* note 3 at 499.

Even at the time of its drafting, the conference participants recognized that the monetary limit of $8,300.00 was extremely low. Criticism of many of the provisions, including the low limit of liability, began immediately after the conference and continued until ICAO[4] called an international conference in The Hague in September, 1955, to amend the Warsaw Convention.

The United States sent an official delegation to the conference at The Hague. One of the major concerns of the delegation was the low limitation on liability. A corresponding concern was that payment of the limit amount should be made promptly to the claimants. To remedy the first concern, i.e., to increase the amount receivable by the claimants, the delegation proposed that attorneys' fees and costs be awarded in addition to the limit. To foster to the second goal, i.e., to encourage prompt payment of the limit amount, the delegation provided that the carrier could avoid the

[4] The International Civil Aviation Organization, ICAO, is the United Nations' civil aviation organization charged with the administration of the principles of the Chicago Convention which is officially titled Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. ICAO was the successor of the committee of experts that drafted the original Warsaw Convention.

addition of fees and costs if it tendered payment within six months.

The American proposal was ultimately refined and adopted by the conference as Article 22(4) of the Hague Protocol.[5] Lowenfeld and Mendelsohn, *supra* note 3 at 504-07. From and after the Hague Conference, the encouragement of prompt and full payment to claimants was a continued objective.

Although the United States has never ratified the Hague Protocol, it has been adhered to by 78 nations,[6] most of which are also members of ICAO and were active participants in the subsequent Montreal Conference and Montreal Agreement negotiations. The acceptance of Article 22(4) is significant in two respects. First, it demonstrates the expectation of the conference as a whole that the Warsaw limitation amount was to be received by the injured passenger, or his representative, in its entirety. Thus, any reduction in the amount due the claimant, either by assessment of attorneys' fees or by diminution of the actual value of the award through delay in receipt, would be counter to the delegates' purposes.

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[5] The Hague Protocol is officially entitled Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* Sept. 28, 1955, 478 U.N.T.S. 371.

Article 22(4) of the Hague Protocol provides:

> The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

[6] Civil Aeronautics Board, *Aeronautical Statutes and Related Material*, 512-14 (1974). Some of the countries adhered to the Protocol on behalf of territories or protectorates which have since become independent.

Second, it was an acknowledgment by the delegates that the treaty regieme envisioned prompt payment of claims by the carrier. The delegates defined the reasonable time in which the carrier should tender payment as six months.

These dual goals reappear in the Montreal Agreement.

The Hague Protocol never received American approval due to general dissatisfaction with the low limit of liability. The Protocol languished in the executive branch of the government for approximately four years before being sent to the Senate, where it was determined that there was little to be desired about the Hague Protocol Amendments because of the low limits of liability.

After much discussion, on November 15, 1965, the United States deposited its formal notice of denunciation, to become effective in six months. At the same time, the Department of State indicated in a press release that it would be willing to withdraw the notice if there was a prospect that an agreement could be reached which would provide for a limit of liability of $100,000.00, or which would establish uniform rules for air transportation without any limit, and if an interim agreement would provide for a limit of $75,000.00 until the ultimate agreement of $100,000.00 was formalized.[7]

As soon as the notice of denunciation was deposited, an Administration working group began compiling statistics to, *inter alia*, determine the additional insurance costs to the airline for increased liability limitations above the Warsaw limit. The statistics proved that the cost of additional insurance to the airlines would be slight. Lowenfeld and Mendelsohn, *supra* note 3 at 552-56.

The State Department's notification, and the concern of the other Warsaw signatories that the most active aviation

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[7] 50 Dep't of State Bull. 923 (1965); Lowenfeld and Mendelsohn, *supra* note 3 at 552.

country in the world would withdraw from the treaty and herald its demise, resulted in immediate mobilization for conferences to try to work out the difficulties. ICAO called a meeting in Montreal for February, 1966.

The major issues discussed at the Montreal Conference were: (1) methods of raising the limit of liability, and (2) implementation of absolute fault on the carrier rather than adherence to the "all necessary measures" defense of Article 20(1). By the time of the Montreal Conference, the objectives sought to be achieved by the Warsaw Convention had altered somewhat. Uniformity of documentation was still of great interest and concern to the parties. However, the statistical study done by the Administration's working group had demonstrated that the airlines, no longer fledgling, no longer required the economic protection of the low liability limitation which was a paramount concern of the drafters of Warsaw. The increased insurance costs for an increased limit would be minimal. Although the airlines, in their own interest, still desired a maximum limit to their exposure, the focus at the conference shifted to greater concern for the passengers' interests. Nevertheless, the conference began by centering on raising the limit.

The United States delegation had not been authorized to propose a figure lower than $100,000.00 as a limitation on liability, although it could explore other possible approaches as long as it did not go below $75,000.00. *Id.* at 557. The delegates of other countries made several suggestions to encourage the United States to lower its $100,000.00 requirement. The most promising plan, proposed by Sweden, Germany, New Zealand and Jamaica, after consultation with the United States, was a two-step enticement: (1) the limits of liability would provide for split limits, one excluding legal fees for those countries in which fees were awarded separately, and one including legal fees for countries like the United States, and (2) absolute fault would be imposed on the carrier. The reasoning behind the suggestion of absolute liability was clear: Elimination of the issue of fault would *avoid the need to delay* settlement negotiations until accident investigation had been completed and would greatly *speed up and reduce the cost of any litigation.* *Id.* at 570 (emphasis supplied).

The two-tiered proposal had considerable appeal because, in the words of the American delegates, "it would enable the delegation to tell Washington that in return for reducing its demands for a 100,000 dollar limit, it had secured what seemed to be a substantial benefit to passengers *in terms of speed and certainty of recovery and probably reduction of legal expenses.*" *Id.* at 571 (emphasis supplied).

The absolute liability provision was voted on first and was defeated. The proposals respecting raising the amount of the limitation were pending but, through a procedural vote, were stayed. *Id.* at 573-75. The Conference ended inconclusively, although the Montreal Conference proposals became the predecessors of the Montreal Agreement provisions. The delegates' articulated purposes, thus, became significant relative to the Montreal Agreement.

Less than two weeks after the close of the conference, the President of the ICAO council wrote the United States Government that, in his opinion, many of the signatory countries would be prepared to accept the requirement of an interim agreement with a $75,000.00 limit. *Id.* at 587.

The Administration[8] again raised the issue of absolute liability, for it was felt that, with it, litigation would be reduced, settlements would be quicker, and the value of plaintiffs' recoveries would be substantially greater than under the then-current Warsaw system. The proposal would

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[8] The Administration was represented by its working group on international aviation, The Interagency Group on International Aviation (IGIA) comprised of representatives from the Department of State, the Federal Aviation Agency, and the Civil Aeronautics Board.

be presented to American carriers, then to Congress, then to international carriers. Lowenfeld and Mendelsohn, *supra* note 3 at 587.

After consultation with American carriers, the Administration reported to ICAO that no consensus was apparent. Then the international carriers, through IATA,[9] submitted a counterproposal: limitations on liability of $75,000.00 if inclusive of costs and fees, $58,000.00 if not, *and* absolute carrier liability. Thereafter began an intense effort by the Administration to pressure and persuade the American carriers and Congress to accept the IATA proposal.

By May 2, 1966, all but three foreign carriers and all but five American carriers had agreed to the IATA counterproposal. Lowenfeld and Mendelsohn, *supra* note 3 at 593. The drafting of the proposed agreement was completed by May 4, 1966 and the remaining American carriers announced agreement to the proposal. The Administration decided to withdraw its denunciation. Two days before the effective date of the denunciation, the denunciation was withdrawn[10] and, simultaneously, the Civil Aeronautics Board approved the agreement.[11]

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[9] International Air Transport Association: a voluntary association of international air carriers.

[10] Department of State Press Release Nos. 110 and 111, May 13 & 14, 1966, 54 Dep't of State Bull. 955-957 (1966).

In Press Release No. 110, the State Department remarked:

> Airlines in international travel will be absolutely liable up to $75,000.00 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and *expedited*. (Emphasis supplied).

[11] Civil Aeronautics Board, *Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol*, summarizing Agreement CAB 18,900, *reprinted in* 49 U.S.C. § 1502. Order E-23,680, Docket No. 17,325 (CAB, May 13, 1966), *reprinted in* 31 Fed. Reg. 7302 (1966).

In order to obtain permission to operate from the Civil Aeronautics Board (CAB), air carriers must agree to the provisions of the Montreal Agreement by filing same with its tariff with the CAB. Inasmuch as the provisions of paragraph 1 establishing the limitation on liability and waiving any Article 20(1) defense are a part of the tariff, they are considered part of the passenger-airline contract. *See, North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978); *Wolf* v. *Trans World Airlines, Inc.*, 544 F.2d 134 (3d Cir. 1976), *cert. denied*, 430 U.S. 915 (1977). Thus, as between passenger and airline it is a contract, a part of the contract of carriage, and should be interpreted as any other contract between private parties. Further, as shall be seen *infra* pp. 21-23, because of its provisions for absolute liability and readily ascertainable damages, it is a contract that provides for measurable liquidated damages for which prejudgment interest is appropriately awarded.

The Montreal Agreement is not a treaty as it is not an agreement between sovereign nations. *See, Rainey* v. *United States*, 232 U.S. 310, 316 (1914); *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 675, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). In construing the scope of the Montreal Agreement, therefore, the Court is not constrained by limitations in the construction of treaties. While the Montreal Agreement is not a treaty itself, it is a permissible "special contract" under the provisions of a treaty, i.e., Article 22(1) of the Warsaw Convention. Thus, the intent and policies of the drafters and signatories to Warsaw must be considered and furthered when construing the Agreement.

The intent of drafters of Article 22(1) is clear: air carriers and passengers could agree to increase the limit of liability above the Warsaw amount. The drafters set no cap to which the amount could be increased; there were no parameters as to how much higher the limit could be. Thus, if an agreement was reached between the carrier and the

passenger that the Warsaw limit would be raised to $100,000.00, or $1,000,000.00, or even $75,000.00 plus prejudgment interest, the intent of the drafters of Article 22(1) would be complied with.

A second objective of the drafters of the Warsaw Convention was to set a predictable and certain limit for the carriers to ascertain their liability. *See, Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, —— U.S. ——, 104 S.Ct. 1776, 80 L.Ed.2d 273, 284 (1984). Permitting the imposition of prejudgment interest does not contravene this objective. The amount of prejudgment interest is easily calculable by the carrier by ascertainment of the legal rate of interest for the amount of time it delays payment. Further, the principle sum is also readily measurable. *See, infra* Section II. Additionally, once an accident occurs and a claimant makes a judicial demand, the carrier can tender the $75,000.00 into the coffers of the clerk of the court to be held pending resolution of any uncertainties without being assessed prejudgment interest.

In cases of an accident in international air travel, the airline has the unilateral power to foster the objective of predictability of maximum liability by tendering the limit amount to the court. Since the claimant has no corresponding power to demand payment if the carrier elects to delay, the award of prejudgment interest would not contravene the intent of the drafters to guarantee a limitation but would foster such certainty by encouraging carriers to proffer the limit to the judicial stakeholder.

The purposes and objectives of the parties to the Montreal Agreement must also be acknowledged and supported. As has been seen, allowance of prejudgment interest does not denigrate the objectives of the Warsaw Convention. However, the objectives of the parties to the Montreal Agreement are somewhat different, and expanded upon the goals of the Warsaw treaty.

As a result of the Montreal Agreement's specific inclusion in the tariffs of all carriers who depart, arrive or stopover in the United States filed with the Civil Aeronautics Board, the provisions effectively become a part of the passenger-airline contract. However, airline passengers did not negotiate the Agreement or attend the Montreal Conference. Designees of the United States government stood in the sted of the passengers and negotiated for their benefit.[12] Therefore, the expectations and objectives of the Administration officials and Congress, acting on behalf of international passengers, are attributable to the passengers.

One of the major goals of the Montreal Conference was to eliminate the issue of establishing fault so as to avoid delays in settlements and speed up recoveries. Lowenfeld and Mendelsohn, *supra* note 3 at 570-71, 593, 600. Another important goal was to raise the limitation on liability. *Id.* at 570-73. However, the nations at the conference could not agree on either absolute liability or the method of raising the limitation on liability. The conference ended inconclusively and private negotiations ensued.

Government Administration designees of the IGIA negotiated on behalf of passengers, and their dual objectives were to increase the limit of liability to at least $75,000.00 and to require absolute carrier liability to guarantee prompt and full recovery by claimants. By this time, the Warsaw goal of financially protecting fledgling airlines from the uncertainties of the risks of flight and unknown insurance costs was essentially nullified by the statistical report[13] that increasing the limit from the Warsaw $8,300.00 to $75,000.00 or $100,000.00 would only add insignificant insurance costs. Thus, in a desperate attempt to prevent the

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[12] *See, e.g.*, Department of State Press Release Nos. 110 and 111, May 13 & 14, 1966, 54 Dep't of State Bull. 955-957 (1966).

[13] *See supra* pp. 13-14.

U.S. Government's denunciation of Warsaw, the carriers readily agreed to raise the limitation to the split level ($58,000.00/$75,000.00) proposed but rejected at the Montreal Conference. Thus, the first major objective of raising the limit of liability was achieved.

The second goal was solely passenger protective. The exclusive benefit of imposing absolute liability inured to the passenger so that speedy and just recoveries would be made. The carriers agreed to it, however, because they received an equally important benefit, i.e., assurance that the Warsaw Convention would remain effective. If the denunciation was permitted to become final, the American carriers knew they would not be afforded the benefits of Warsaw for any flights into, out of, or with a stopover in the United States. The foreign carriers were aware that if the United States, the greatest force in world aviation, withdrew from the Convention the entire treaty regime would collapse.

The carriers, both domestic and foreign, obtain significant benefits from the Warsaw Convention, including uniformity in documentation and ticketing; assurance of applicable law and the number of places it can be sued; and liability limitation (whatever the amount). Without Warsaw, there would be no uniformity, no limits and no procedural assurances.

Thus, the bargain was made. Plaintiffs received the benefit of prompt recoveries. Carriers received the benefits conferred by the continued existence of Warsaw. Both parties received the assurance of essentially liquidated damages. (*See infra* pp. 21-23).

These objectives and expectations of the parties to the Montreal Agreement are engrafted onto the passenger-airline contract. However, in practice, the carriers frequently breach the contract by unduly delaying payment, often many years, thus diminishing the passenger's recovery and benefiting themselves by earning interest on the wrongfully withheld money. In cases of such breaches, it is justifiable under ordinary contract law to impose prejudgment interest on the airline. To do so not only furthers the interests of justice and equity under contract law, but it also fosters the intents of the parties to the Montreal Agreement and does not contravene the objectives of the Warsaw Convention. The carriers have the sole power through delay to unilaterally thwart the objectives of the Montreal Agreement by negating the reason for imposing absolute liability. The passengers do not have a corresponding right to rescind the carriers' benefits, i.e., to denounce the Warsaw Convention. Thus, only by permitting the imposition of prejudgment interest can this Court guarantee that the objectives of the Montreal Agreement will be achieved.

II. DAMAGES UNDER THE MONTREAL AGREEMENT ARE ESSENTIALLY LIQUIDATED DAMAGES FOR WHICH THE AWARD OF PREJUDGMENT INTEREST IS PROPER

Article 24(1) of the Warsaw Convention established that the law to be applied to the measure of damages and proper beneficiaries is the law of the court seized of the case. Thus, in a death case, it is a simple exercise for the carrier to ascertain whether the damages for the death of a decedent exceed $75,000.00 by ascertaining fixed items such as the age, income and family circumstances of the decedent. In most cases of adults, the death damages quickly exceed $75,000.00.

Given the foregoing, then, the damages for wrongful death under the Montreal Agreement are, by their very nature, reasonably measurable, ascertainable, liquidated damages. Even if a specific sum per individual injury or death is not fixed, the claim is readily ascertainable by mathematical computation and by reference to well-established standards. *See,* 22 Am. Jur. 2d *Damages* § 181 (1965). *See also, Ramada Development Co.* v. *U.S. Fidelity and Guaranty Co.*, 626 F.2d 517, 525 n.11 (6th Cir. 1980) [defining liquidated damages as those damages "which are

reasonably ascertainable [or] . . . measurable by a fixed or established external standard . . . ."].

Prejudgment interest is permitted as a matter of right when the debtor knows that he is to pay and when he is to pay it. Even when the amount of damages is not specifically fixed, prejudgment interest is permitted on damages defined as liquidated if the amount of damages is ascertainable by computation or by reference to established standards. Once the injury is complete, the damages will be ascertainable. *Prejudgment Interest: An Element of Damages Not to be Overlooked*, 8 Cumberland L. Rev. 521, 522 (1977) [hereinafter cited as *Prejudgment Interest*]; *Eazor Express, Inc.* v. *International Brotherhood of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976); C. McCormick, *Damages* § 54 (1935).

The Montreal $75,000.00 is not a guaranteed recovery. It is the maximum required to be paid immediately after the accident. However, external standards, fixed at the time of death, e.g., the decedent's age, income, and family circumstances, are easily ascertainable and the carrier can readily determine whether the $75,000.00 is met or exceeded. Thus, the general reasoning for not awarding prejudgment interest for wrongful death in open-ended, variable damages cases, e.g., *Kozar* v. *Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971); *Casey* v. *American Export Lines, Inc.*, 173 F.2d 324 (2d Cir. 1949); *Cortes* v. *Baltimore Insular Line Inc.*, 66 F.2d 526 (2d Cir. 1933), is not applicable in a Warsaw/Montreal case. Here, the maximum permissible award is known with certainty and the damages are liquidated as of the time of the breach. Petitioner Eastern Airlines has never denied knowledge that the case at bar involved damages far in excess of $75,000.00, known within weeks of the accident.

International air carriers are sophisticated entities. As corporate parties, they deal with contracts of all kinds daily. Thousands of passenger ticket contracts are issued on a daily basis, as well as sales contracts, maintenance contracts, etc. As a routine practice, insurance claims personnel begin contacting the injured parties within days after an accident and set their potential loss reserves shortly thereafter. In this knowledgable position, the general expectation of a contracting airline is that any applicable remedies available under contract law would be assessed against them, if applicable to a given fact situation. Prejudgment interest is one such remedy available in situations, such as this, of ascertainable liquidated damages. No expectations of the carriers, thus, would be negated if prejudgment interest is awarded.

III. THE MONTREAL AGREEMENT IS SIMILAR TO AN INSURANCE CONTRACT WITH POLICY LIMITS AND THE CONSIDERATIONS PERTAINING THERETO ARE RELEVANT

A parallel analogy to the Montreal Agreement contract is a liability insurance contract which provides for policy limits. Generally, the liability of an insurer and the extent of the loss under a policy of liability or indemnity insurance is determined by the terms of the contract. 16 G. Couch, *Cyclopedia of Insurance Law* § 56:1 (2d ed. 1966). Similar to the Montreal Agreeent limitation of liability, an insurer's obligation is usually limited by the stated policy limits. However, when the insurer becomes liable for prejudgment interest and it exceeds the policy limit, the total obligation of the insurer can exceed the stated contractual maximum. Nevertheless, the modern approach is to permit prejudgment interest to be imposed against the insurer in excess of the policy limits. *Denham* v. *Bedford*, 82 Mich. App. 107, 266 N.W.2d 682 (1978), *aff'd*, 407 Mich. 517, 287 N.W.2d 168 (1980); *Busik* v. *Levine*, 63 N.J. 351, 307 A.2d 571 (1973); *Michigan Milk Producers Ass'n* v. *Commercial Union Ins. Co.*, 493 F.Supp. 66, 71 (W.D. Mich. 1980). *See also, Insurer's Liability for Prejudgment Interest: A Modern Approach*, 17 U. Rich. L. Rev. 617 (1983).

The same rationale applies here. The carrier has the sole control of the funds. It cannot wilfully withhold payment, earning interest to its own benefit, in a nonchalant manner without equity requiring that prejudgment interest may be assessed even if it exceeds its "policy", i.e., contractual limit.

IV. A CLAIMANT'S ABSOLUTE RIGHT TO RECEIVE COMPENSATION UNDER THE MONTREAL AGREEMENT IS A PROPERTY RIGHT, INTERFERENCE WITH WHICH JUSTIFIES AN AWARD OF PREJUDGMENT INTEREST

Under the Montreal Agreement, a passenger injured or killed on an international flight has an absolute right to recover provable damages. The only caveat relates to the limitation of liability provision, and its scope, which is under analysis here. Both the carrier and the passenger (by imputed knowledge via the Notice of Limitation of Liability on the ticket) are aware of the passenger's right to recovery. As such, the interest to which the passenger is entitled if killed or injured in international flight is a property right of significance.

Property rights in intangibles have long been recognized. In the context of defining when an individual has a property right such that it cannot be terminated without due process of law, this court has acknowledged that a right or entitlement to receive certain benefits is a legitimate and protected property right.[14] *Goldberg* v. *Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 25 L.Ed.2d 287, 295 (1970); *King* v. *Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Board of Regents* v. *Roth*, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 33 L.Ed.2d 548, 560 (1972); *See also, Foggs* v. *Block*,

[14] The cases refer to a "property interest". However, to avoid confusion in the brief since "interest" herein is usually associated with prejudgment interest, the term "property right" will be used.

722 F.2d 933 (1st Cir. 1983); *Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977), *cert. granted*, 439 U.S. 816, 99 S.Ct. 75, 58 L.Ed.2d 106 (1978), *aff'd in part, rev'd in part*, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979); *Griffeth* v. *Detrich*, 603 F.2d 118 (9th Cir. 1979), *cert. denied*, 445 U.S. 970, 100 S.Ct. 1348, 64 L.Ed.2d 247 (1980); *Basciano* v. *Herkimer*, 605 F.2d 605 (2d Cir. 1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d 296 (1979); *Camacho* v. *Bowling*, 562 F.Supp. 1012 (N.D.Ill. 1983).

The thrust of the cases is that a person who has a legitimate claim of entitlement, not merely an abstract need or unilateral expectation, has a judicially protected property right to that commodity. Once an individual has complied with pre-established ground rules, the property right attaches.

Claimants in international air travel on a carrier signatory to the Montreal Agreement who are killed or injured have met all of the "eligibility" requirements for payments under Montreal if (A) the passenger's travel was "international transportation" [Article 1]; (B) the accident which caused the injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking [Article 17]; (C) the passenger did not contribute to the accident [Article 21]. These requirements are easily ascertainable. If met, the carrier is absolutely liable to pay damages up to $75,000.00. As such, passengers who have met the standards, have a property right.

When a carrier fails to pay the amount justified under Warsaw/Montreal, he is wrongfully interfering with a property right. Courts have long recognized that prejudgment interest is allowed as a matter of right in cases involving interference with property rights. *See, Prejudgment Interest* at 530 and cases cited therein; *Barbush* v. *Oiler*, 158 Ga. App. 625, 281 S.E.2d 359 (1981).

V. POLICY CONSIDERATIONS FAVOR THE AWARD OF PREJUDGMENT INTEREST

One of the stated salutary goals of awarding prejudgment interest is identical to the rationale for the absolute liability provision of the Montreal Agreement: To encourage early settlement where liability is clear. *Laudenberger* v. *Port Authority*, 496 Pa. 52, 436 A.2d 147, 150-51 (1981), *appeal dismissed*, 456 U.S. 940, 102 S.Ct. 2002, 72 L.Ed.2d 462 (1982); *Busik* v. *Levine*, 63 N.J. 351, 307 A.2d 571 (1973); *General Facilities Inc.* v. *National Maritime Service Inc.*, 664 F.2d 672, 674 (8th Cir. 1981) ["Prejudgment interest serves at least two purposes: . . . (2) where liability and the amount of damages are fairly certain, it promotes settlement and deters an attempt to benefit unfairly from the inherent delays of litigation"].

As has been succinctly stated:

> Thus, the purpose of prejudgment interest is to put a plaintiff in the position he would have been in had he had his trial and received his judgment immediately after his injury. *Accord, City and Borough of Juneau* v. *Commercial Union Ins. Co.*, 598 P.2d 957 (Alaska 1979);
>
> *Carlton* v. *H. C. Price Co.*, 640 F.2d 573, 576 (5th Cir. 1981).

As has been seen previously, *supra* pp. 6, 11-13, as far back as the Hague Conference in 1955, the delegates desired disposition of claims immediately after the injury. This goal was carried through to the Montreal Agreement by imposition of absolute liability to achieve this aim. In certain cases, dilatory tactics and deliberate delay by the carriers have thwarted this underlying goal of the Agreement. Only by the award of prejudgment interest can this goal be reinvigorated and fostered.

This Court, too, has acknowledged that rules denying prejudgment interest create incentives to prolong litigation.

General Motors Corp. v. *Devex Corp.*, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed.2d 211, 218 n.10 (1983).

In addition to providing positive incentives to discourage delay, the reasons for awarding prejudgment interest are to provide full and just compensation to the plaintiff, *Rosa* v. *Ins. Co. of Pennsylvania*, 421 F.2d 390, 393 (9th Cir. 1970) [prejudgment interest awarded on marine fire insurance policy]; *Jones Stevedoring Co.* v. *Nippo Kisen Co.*, 419 F.2d 143 (9th Cir. 1969) [prejudgment interest awarded on indemnity claim]; *Hembree* v. *Georgia Power Co.*, 637 F.2d 423, 430 (5th Cir. 1981) [prejudgment interest awarded where veteran deprived of reemployment rights]; *Rolf* v. *Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980) [prejudgment interest awarded for fraudulent management of investor's deposit account]; *Myrom* v. *Chicione*, 678 F.2d 727, 733 (2d Cir. 1982) [prejudgment interest awarded in securities fraud]; *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed. 2d 211, 217 (1983) [patent infringement case], and to implement governing considerations of fairness, *United States* v. *Calif. State Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901, 102 S.Ct. 1744, 72 L.Ed. 2d 157 (1982) [prejudgment interest awarded for improper collection of sales taxes]; *Rolf* v. *Blyth, Eastman Dillon & Co.*, 637 F.2d at 87. *See also*, 22 Am.Jur.2d *Damages* § 181 (1965). It is generally for these reasons that the modern approach permitting prejudgment interest has developed supplanting the historical bias against the award of prejudgment interest in wrongful death cases. That bias existed because of the variable nature of the amount of damages inherent in wrongful death cases. *Weeks* v. *Alonzo Cothron, Inc.*, 493 F.2d 538 (5th Cir. 1974); [Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1970)]; *Gardner* v. *National Bulk Carriers, Inc.*, 333 F.2d 676 (4th Cir. 1964) [Jones Act, 46 U.S.C. § 688 (1958)]; *Trexler* v. *Tug Raven*, 290 F. Supp. 429 (E.D.Va. 1968), *rev'd on other grounds*, 419 F.2d 536 (4th Cir.), *cert. denied*, 398 U.S. 938 (1970) [Jones Act, 46 U.S.C. § 688 (1958)].

Whether or not the damages are liquidated, the statutes which permit the discretionary award of prejudgment interest recognize the inexorable economic fact that the money eventually paid in damages has earned a rate of return for the defendant's benefit during the pendency of the litigation and the plaintiff has been correspondingly deprived of that amount. The money thus earned by a carrier in a Montreal case reduces his total exposure such that it actually pays less than the $75,000.00 requirement under the contract. Similarly, since the claimant must utilize his own funds while litigating or awaiting the carrier's offer, his ultimate recovery is reduced to less than the $75,000.00 guaranteed if damages are at or exceed that amount.

Federal courts interpreting federal statutes have long acknowledged the importance of interest in furthering considerations of fairness and will award it at the discretion of the trial judge or jury when equity requires. *See, e.g., Blau* v. *Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed. 2d 403, 411 (1962) [action under Securities and Exchange Act, § 16(b)]; *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed.2d 211 (1983) [patent infringement, 35 U.S.C. § 284]; *Rodgers* v. *United States*, 332 U.S. 371, 373, 68 S.Ct. 5, 7, 92 L.Ed. 3, 6 (1947) [Agricultural Adjustment Act]; *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064, 1075 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 929 (1976) [Securities and Exchange Act]; *Eazor Express Inc.* v. *International Brotherhood of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975), *cert. denied*, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976) [Labor Management Relations Act, § 301]; *Chris Craft Indus.* v. *Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977) [federal securities law].

Admiralty courts have also been sympathetic to awarding prejudgment interest and award interest regardless of whether the claim is liquidated. *Cargill Inc.* v. *Taylor Towing Serv. Inc.*, 642 F.2d 239, 242 (8th Cir. 1981); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F.2d 583, 592 (2d Cir. 1961), *cert. denied*, 368 U.S. 989, 82 S.Ct. 606, 7 L.Ed.2d 526 (1962). *See also* Annot., *Award of Prejudgment Interest in Admiralty Suits*, 34 A.L.R. Fed. 126 (1975); Note, *Interest—Prejudgment Interest Allowed Under Death on the High Seas Act*, 110 U. Pa. L. Rev. 612 (1962).

Equitable concerns are always permissible in balancing the interests between two private parties to a contract.

In a Montreal Agreement case, the intent of the parties was that the carrier would pay, and the passenger/beneficiary would receive, $75,000.00 at a time reasonably contemporaneous with the time of the accident. If a claimant under the Montreal Agreeent is to receive the amount contemplated by the parties, and if delays in that receipt are occasioned by the carrier, then prejudgment interest must be awarded to compensate for the loss of use of the funds which should have been paid immediately. Correspondingly, if the parties to the Montreal Agreement envisioned that the carrier's liability for wrongful death in a case in which actual damages exceed $75,000.00 was to be only $75,000.00, then prejudgment interest is necessary to make allowances for the lesser amount the carrier would have invested to reach $75,000.00 with the addition of the interest obtained through the delay.

Carriers can, of course, always avoid imposition of prejudgment interest by paying the $75,000.00 limit into the court pending resolution of any uncertainties. This is done frequently in insurance policy impleader actions.

CONCLUSION

The award of prejudgment interest was within the reasonable expectations of a sophisticated contracting party such as Eastern and does not contravene the intent or objectives of the Warsaw Convention. Indeed, imposition of prejudgment interest fosters the salutary goals of the Montreal Agreement to encourage prompt disposition of claims arising out of international air travel.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.

Petitioner,

v.

ROBERT F. MAHFOUD,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Under the Warsaw Convention as supplemented by the Montreal Agreement, the liability of an air carrier for the death or injury of each passenger engaged in international transportation is limited to $75,000. May a court hearing such a case award prejudgment interest on the plaintiff's damages to compensate him for the loss of use of his money due to delay?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1807

EASTERN AIR LINES, INC.,
Petitioner,
v.
ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

STATEMENT

A. Background

In that the issue presented is heavily fact-dependent, respondent ROBERT F. MAHFOUD ["Mahfoud"] believes that a more detailed discussion is essential to a proper disposition of this case.

The action arose out of the crash at John F. Kennedy International Airport of Eastern Flight 66 on June 24, 1975. Respondent's decedents BERNARD F. MAHFOUD and ODILE W. MAHFOUD were fare-paying passengers enroute from New Orleans, Louisiana to Paris, France via New York on a roundtrip ticket purchased in Paris for passage from Paris to New Orleans and return.

Mahfoud commenced suit in the Western District of Louisiana on December 4, 1975 for wrongful death damages against the principal defendant, Eastern Air Lines, Inc. ["Eastern"]. Jurisdiction was transferred, pursuant to 28 U.S.C. § 1407, to the Eastern District of New York on February 4, 1976. By amended complaint of June 17, 1976, Mahfoud added the United States of America, the Eastern cockpit crew and others as defendants. By its answers of January 26, 1976 and June 30, 1976, Eastern pleaded the limitation of liability of the Warsaw Convention/Montreal Agreement as an affirmative defense.[1]

Mahfoud has never contended that Warsaw/Montreal was not applicable.

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[1] The Warsaw Convention, officially known as The Convention For Unification of Certain Rules Relating to International Transportation by Air, created a uniform body of law pertaining to the rights and responsibilities of passengers and international air carriers. Warsaw Convention, *done* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note. The United States became a party to the convention in 1934. On November 15, 1965, the United States gave notice it would denounce the Convention because of its low limit of liability, approximately $8,300, for personal injury or death to passengers. In May, 1966, before the denunciation took effect, a new liability system was agreed upon by the United States and foreign air carriers. The Montreal Agreement, as it is known, increased the limitation of liability to $75,000 and created absolute liability of airlines in international travel which includes a point in the United States. The official title of the Montreal Agreement is the Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900. The Montreal Agreement was approved by the United States Civil Aeronautics Board, Order No. E-23680, 31 Fed.Reg. 7302 (1966), *reprinted at* 49 U.S.C. app. § 1502 note. Hereinafter, the Warsaw Convention, as modified by the Montreal Agreement, will be cited as "Warsaw/Montreal".

On September 11, 1978, the date set for a trial on liability in New York, defendant United States advised the District Court and the parties that the Government, while not admitting negligence, would consent to a judgment against it in the passenger cases.[2] In its letter presented to the Court, the Government stated in part:

> "Regarding the above litigation, the Government now feels that it is in its best interest and in the best interest of the victims of this disaster to inform the Court and the parties to this litigation that the Government, while not admitting negligence, will not contest the issue of liability against it in the passenger cases. We appreciate the need to compensate the families of the innocent passengers in this case and feel that a trial will unduly waste the time of the court and the parties." J.A. 33[3]

Prior to this announcement, Eastern and the United States had entered into an agreement whereby Eastern agreed to pay 60% and the Government the remaining 40% of any passenger settlement or damage judgment.

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[2] Subsequent to *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), Mahfoud dismissed the Eastern crew actions; additional defendants, other than Eastern and the United States, were dismissed upon completion of pretrial discovery.

[3] After the Government's announcement was made, Eastern requested and received a one week delay to resolve a dispute it had with the Government regarding prejudgment interest to which the passenger cases were entitled. The United States had consented to liability judgments because it was not liable, pursuant to statute, for prejudgment interest. Although clearly negligent, Eastern refused to consent to liability judgments and requested that the passenger cases proceed with damage trials against the United States alone. Eastern pursued this strategy in order to deprive plaintiffs of interest that was approximately 20% of the recovery at time of trial under New York law.

This was confirmed by letters of agreement between William G. Schaffer, Deputy Assistant Attorney General and Robert L. Alpert, Vice President of United States Aviation Underwriters, Inc., the insurers of Eastern. J.A. 29-32. In his letter of March 1, 1978 confirming the agreement, Mr. Alpert stated at page 2:

> "As a condition precedent to the maximum limit of the contribution on the part of the United States referred to in Paragraph (7) of your letter, Eastern's insurers, through the undersigned, will have complete control over the damage discovery, damage trials, appeals and any decisions relating to the settlement or non-settlement of a particular passenger case." J.A. 32

This mandate, agreed to by the United States, gave Eastern's insurance company full control over all subsequent matters pertaining to this litigation.

The trial to determine liability commenced on September 18, 1978 and concluded on October 25, 1978 when the jury returned a verdict that found Eastern negligent and liable. A judgment on the liability issue was entered on November 1, 1978. By an Order entered December 6, 1978, the district court granted Eastern's request for certification pursuant to 28 U.S.C. § 1292(b) and on January 16, 1979, the United States Court of Appeals for the Second Circuit granted leave to appeal.

Following the agreement by the United States not to contest liability, Mahfoud had moved for summary judgment and judgment on the pleadings against defendant Eastern on September 18, 1978 pursuant to Warsaw/Montreal. Eastern resisted the motion on the technical ground that Mahfoud was not a proper party to bring the action. This defense was asserted despite the fact that Eastern knew of the capacity of Mahfoud as early as May

28, 1976 by Plaintiff's Answers to Interrogatories (J.A. 10 and 17, answers 8 and 92) and by production on July 7, 1976 of both the certified Letters of Legal Tutorship issued October 17, 1975 and the Letters of Administration issued September 15, 1975 by the Twenty-Fourth Judicial Court, Parish of Jefferson, State of Louisiana. J.A. 27, response 6(1). Thus, Eastern knew full well that Mahfoud was qualified to bring the action in either Louisiana or New York, and the claim that he lacked capacity was a spurious defense used solely for delay.

Upon oral argument of the motion, counsel for Mahfoud and other movants stated:

> "Under the Montreal Agreement, Warsaw Convention, the airline is liable, without proof of negligence, and consequently these plaintiffs are entitled to have judgment on liability only entered against Eastern and by entry of such a judgment it cannot prejudice subsequent determinations as to any defenses they may have; damage limitation, interest, prejudgment interest, capacity to sue or whatever they wish to raise.
>
> Consequently, in order to eliminate these passengers from the trial which hopefully will commence on Monday morning, we have asked that judgment be entered against Eastern only on liability only leaving all issues for a later time." J.A. 94-95.

There was never any intention by Mahfoud to deprive Eastern of any of its defenses.

On September 26, 1978, the district court clerk signed an order granting Mahfoud's motion for summary judgment and judgment on the pleadings. J.A. 36-37. The Order was drafted by Eastern and omitted references to the preservation of Eastern's defenses. Judgment was entered on September 28, 1978 in favor of Mahfoud against Eastern "on the issue of liability only".

Despite the fact that Eastern's attorneys drew up the Order, Eastern appealed the aforesaid judgment on the ground that it contained language found in Rule 54(b) of the Federal Rules of Civil Procedure regarding judgment upon multiple claims or involving multiple parties. Eastern's appeal resulted in the consolidation of Warsaw/Montreal actions under the caption of *Winbourne v. Eastern Air Lines, Inc.*, Docket No. 78-6178 (E.D. N.Y. 1978). On December 1, 1978, the District Court issued an order deleting as a clerical error the Rule 54(b) language contained in its previous order. On January 16, 1979, the Second Circuit dismissed the original *Winbourne* appeal for want of jurisdiction.

Mahfoud then moved to amend the judgment entered on September 28, 1978 to provide that Eastern was not precluded from raising its defenses for lack of capacity to sue or any other defense it might have, and also to reaffirm the grant of summary judgment and judgment on the pleadings. J.A. 38-41. The motion was granted by Order of June 1, 1979. J.A. 42. By cross-motion and notice of motion, Eastern applied for certification of the judgment entered pursuant to 28 U.S.C. § 1292(b). On August 13, 1979 the Second Circuit granted Eastern's petition for leave to appeal, which resulted in *Winbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219 (2d Cir. 1980).

The jury verdict for plaintiff two years earlier had not deterred Eastern from its appeals, which very effectively delayed all damages trials, including that of Mahfoud.

Finally, with Mahfoud's damages trial imminent in New York, Eastern withdrew its procedural defense of lack of capacity and filed its own motion for summary judgment pursuant to Warsaw/Montreal.

Upon subsequent transfer to the Western District of Louisiana by the Eastern District of New York for a trial

on damages (J.A. 67), Eastern reasserted its motion for summary judgment pursuant to Warsaw/Montreal. After more than six years of opposition to Mahfoud's efforts to obtain a judgment for the amount of the Warsaw/Montreal limitation, and over seven years after the crash causing the Mahfoud deaths, Eastern finally sought protection of the liability limits, free of any responsibility for the funds it had retained at plaintiff's expense.

B. The Decisions Below

At the status conference before the Western District of Louisiana on November 10, 1982, Eastern Air Lines and the United States of America, both represented by the attorneys for Eastern, conceded that the previously alleged lack of capacity was not now an issue in the case. J.A. 68. This concession was made despite the fact that the Government never raised the issue in its pleadings and Mahfoud had never produced additional evidence to oppose the so-called capacity defense.[4] Still representing

[4] Note 6, page 6 of Eastern's brief alludes to an offer of judgment filed September 14, 1978 under Fed. R. Civ. P. 68, just four days prior to Mahfoud's motion for summary judgment pursuant to Warsaw/Montreal. The "offer" was never transmitted to Mahfoud's attorney of record in New York and Eastern specifically stated that the offer did not provide for prejudgment interest. Moreover, the offer specifically states on its face that "this offer of judgment is made for the purpose specified in Rule 68. . ." J.A. 34. Rule 68 applies to "costs" and not to "interest" and the rule specifically provides that such offer cannot be used in any proceeding except to determine costs. However, the "offer" clearly demonstrates the lack of merit of the later abandoned defense of lack of capacity to sue in that it was made only four days before Eastern opposed Mahfoud's motion for summary judgment and judgment on the pleadings pursuant to Warsaw/Montreal.

defendant United States, the Eastern attorneys filed a Motion in Limine seeking a determination of whether the law of New York or of Louisiana would be applicable to damages, as well as a motion for partial summary judgment to limit Eastern's liability to $75,000 per decedent pursuant to the provisions of the Warsaw Convention/Montreal Agreement. J.A. 69, 73.[5]

With reference to the motion for partial summary judgment, Mahfoud agreed with Eastern that Warsaw/Montreal governed liability but asserted entitlement to prejudgment and post-judgment interest over and above the $75,000. In its Order (J.A. 74), the court discussed the various multidistrict proceedings in New York and pointed out that Eastern's appeal and the Second Circuit's reversal of the district court in *Winbourne v. Eastern Air Lines, Inc., supra*, were not based on Eastern's denial of the application of Warsaw/Montreal to the death of the decedents, but rather on certain deficiencies arising

[5] In an affidavit attached to Eastern's motion for partial summary judgment, Walter E. Rutherford, attorney for Eastern, states under oath, in part, the following:

> "Mrs. Mahfoud's passenger ticket was apparently destroyed in the accident, but Eastern retained a coupon for Mr. Mahfoud's and Mrs. Mahfoud's transportation on Eastern Flight 66, when they presented themselves for boarding. As appears from Mr. Mahfoud's ticket and Mrs. Mahfoud's flight coupon, decedents' tickets were issued in Paris, France on June 14, 1975, for decedents' passage on Air France 067 on June 16, 1975, from Paris to Houston, Texas; on Continental Air Lines Flight 420 on June 16, 1975, from Houston, Texas to New Orleans, Louisiana; on Eastern Flight 66 on June 24, 1975, from New Orleans, Louisiana to New York, New York; and to return on Air France to Paris, France from New York, New York. *Thus, at the time of the accident, decedents were engaged in international transportation, pursuant to the Warsaw Convention/Montreal Agreement.*" J.A. 63-64. (emphasis supplied).

from Eastern's objection to plaintiff's procedural capacity to prosecute this action. The court further noted that Eastern had now accepted the procedural capacity of the plaintiff. The court pointed out that while Mahfoud's various references to the requirement for "proven damages" were intended to show that the $75,000 limitation of the Montreal Agreement was not intended to include interest, "we do not take these references to proven damages to mean that the allowance of interest on $75,000 was considered by the parties to the WC/MA [Warsaw/Montreal], and accepted". The court continued, stating that "there is no indication that interest was considered by the drafters and specifically included in or excluded from the $75,000 limitation. However, we do not believe, as defendants suggest, that this totally precludes the imposition of interest in certain cases." J.A. 76. The court further stated that it agreed with the dual-purpose reasoning recognized by Judge Collins in *Winbourne v. Eastern Air Lines, Inc.*, No. 75-715C (E.D.La. 1982). The court noted that "[t]he *Winbourne* court reasoned that the Montreal Agreement contemplated prompt recovery to the passenger from the airline in return for the maximum damage award limitation and that this purpose was frustrated when litigation continued for six years after the crash." The district court also noted Judge Collins' statement that "[a]n additional equitable consideration militating in favor of such award is that airlines would be unjustly enriched if allowed to interminably litigate the issues and withhold from survivors that to which they are entitled by law." J.A. 77.

The district court then considered the State Department press release describing the Montreal Agreement which stated:

> "Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and *expedited*."
>
> Department of State Press Release No. 110, May 13, 1966, as quoted in *Winbourne v. Eastern Air Lines, Inc.*, 479 F.Supp.1130, 1141 (E.D.N.Y. 1979) (emphasis added). Appendix A-3.

The district court held that "it is unconscionable to let an airline delay litigation to an extent that a smaller amount of money may be invested in order to pay a $75,000 claim. The WC/MA [Warsaw/Montreal] was intended for speedy resolution of claims. The plaintiff has never contested that the WC/MA applied, and, in fact, moved for summary judgment on that issue. That motion was resisted by Eastern on purely procedural grounds which were later withdrawn." J.A. 78-79.

On December 2, 1982, three days before the damages trial, Eastern deposited $150,000 into the registry of the district court for payment of damages in the amount of $75,000 per decedent and filed a motion for reconsideration which was denied on December 27, 1982. J.A. 82.

Mahfoud's damages claims were tried, with Respondent and the United States presenting evidence, and the district court entered its findings on April 5, 1983. R.1120. On April 21, 1983, the district court entered judgment against the United States and Eastern and in favor of respondent, on behalf of decedent's minor children, in a total amount of $1.65 million, exclusive of interest. J.A. 84. Eastern was adjudged liable for the principal amount of $150,000 and for prejudgment interest on that amount, pursuant to the interest laws of Louisiana, from December 4, 1975, the date the complaint was filed, to December 2, 1982, the date that $150,000 was deposited into the registry of the court. J.A. 84-85.

Eastern appealed the judgment of the district court to the United States Court of Appeals for the Fifth Circuit on the ground that the award of prejudgment interest contravened the provisions of Warsaw/Montreal.

While that appeal was pending, the Fifth Circuit held in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), that both prejudgment and post-judgment interest might be awarded in a Warsaw/Montreal case. Citing *Domangue*, the Fifth Circuit affirmed the *Mahfoud* judgment of the district court on March 8, 1984 in a brief per curiam opinion. J.A. 88.[6]

The *Domangue* court pointed out that no circuit court had squarely addressed the issue of Warsaw/Montreal interest. However, based on its previous experience with Warsaw/Montreal issues obtained in *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), and its careful examination of the history of the development and adoption of the Convention, the Fifth Circuit found "it clear that the dominant objective was to permit the growth of an infant industry by setting limits of liability." 722 F.2d. at 261. The Court noted that "[a]s early as the 1955 conference at The Hague, however, the United States had made known that it was interested in more substantial recoveries for the injured parties or their survivors" and had "proposed that Article 22 of the Warsaw Convention be amended to allow the award of

---

[6] Whereas the results reached are the same, the facts of *Domangue* and *Mahfoud* differ in that Mahfoud never contended that Warsaw/Montreal did not apply, whereas the plaintiff in *Domangue* disputed whether or not the airline ticket contained a required notice of the Montreal limitation of liability and whether or not Eastern was guilty of wilful misconduct.

litigation expenses, including attorneys fees in addition to the primary award." *Id.* at 261. The court concluded that "no one outside the United States had previously thought that the Warsaw Convention prevented a charge on the defendant for the plaintiff's costs." 722 F.2d. at 261. (citing A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 507 (1967), (hereinafter "Lowenfeld")).

The Fifth Circuit then considered the Montreal Conference and stated:

> "At the Montreal Conference there was an important additional American objective. It was to encourage the speedy disposition of claims. By this means the victims of an air crash or their survivors would receive the money when it was most needed. *Id.* [Lowenfeld] at 570-71. To that end the United States co-sponsored the plan which eliminated the issue of fault in establishing liability. The United States argued that doing so would 'avoid the need to delay settlement negotiations until accident investigations had been completed, and would greatly speed up and probably reduce the cost of any litigation'. *Id.* [Lowenfeld] at 570-71, 593, 600." 722 F.2d at 261.

The *Domangue* court discussed post-judgment interest and pointed out that there must be a balance between "maintaining a fixed and definite level of liability with the objectives of encouraging the speedy compensation for damages and the maximum recovery for injured parties or their survivors". 722 F.2d at 262. The court then stated:

> "We find that the objectives of the Warsaw/Montreal legislation are well served by allowing the payment of post-judgment interest above and beyond the $75,000 limit to liability established by the Montreal Agreement. Because the amount of any interest is easily calculable, and depends only on the legal rate of interest and the amount of time that the defendant delays in compensating the injured party, we find that air carriers are still provided with a definite basis for determining their liability." *Id.* at 262.

The court went on to consider the $75,000 limitation provision of the Montreal Agreement. Eastern appears to have made the same arguments in *Domangue* as it is now making in *Mahfoud*, that the dual limits of recovery under Montreal ($75,000 exclusive of legal fees and costs in the United States and $58,000 plus attorneys fees and costs in certain other countries) support the inclusion of interest in addition to the base judgment up to the $75,000 limitation. The court held to the contrary, noting that legal fees were specifically allowed to be awarded in addition to the base judgment and that the ceiling on awards was raised at the Montreal Conference in part to allow the inclusion of legal fees pursuant to the American practice of not awarding them separately. Further, "[i]t is accepted practice, however, for American courts to award post-judgment interest in addition to a judgment. *See* 28 U.S.C. § 1961. Therefore there was no reason for the ceiling on liability to take into account the cost of interest." 722 F.2d at 262.

As to prejudgment interest, the *Domangue* court pointed out that there has been a general willingness on the part of the courts to award prejudgment interest when justice and fairness so requires. The court compared the holding in *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (5th Cir.), *cert. denied*, 422 U.S. 930 (1975), in which the Fifth Circuit held that "Philipps ought not to be able to use someone else's money as it pleased for ten years, thereby enjoying a very considerable benefit, and then paying nothing for the use of the money," with the

facts before it and stressed that "Eastern did not pay any money either to the plaintiff or into court until sometime after its motion for summary judgment was granted." 722 F.2d. at 263. Eastern thus had the use of $75,000 to which Mrs. Domangue was entitled, as it had the use of the $150,000 to which Mahfoud was entitled, for a period of more than six and a half years.

The court then found that "allowing victims a more adequate recovery and ensuring speedy disposition of claims were important objectives leading to the modification of the Warsaw Convention by the Montreal Agreement", and that "awarding pre-judgment interest is permissible under the Warsaw/Montreal body of law and is within the discretion of the court." *Id.* at 263. The Fifth Circuit was also influenced by the inequity of Eastern Airlines benefitting from the length of time between the crash and a final judgment in this case, to the detriment of the decedent's survivors. *Id.* at 263-264.

In *Domangue*, the court concluded with the following:

> "Factors for the court to consider in deciding whether to award pre-judgment interest thus may include the length of time between the tort and judgment, and whether the defendant caused or contributed to any delay. A potential award of pre-judgement interest advances the objective of encouraging speedy compensation to victims, and ensures that the aim of obtaining a high recovery for victims and their survivors is not defeated by a defendant's simple strategy of delaying payment or judgment until the award is diminished in actual value. We agree with the Supreme Court of New Jersey's reasoning in *Busik v. Levine* that the allowance of pre-judgment interest on an unliquidated tort claim will induce prompt defense considerations of settlement possibilities. 63 N.J. 351, 307 A.2d 571, app. dism'd., 414 U.S. 1106, 94 S.Ct. 831, 38 L.Ed.2d 733 (1973). It is also likely to discourage delay if the case is taken to court. Allowing such interest does not defeat the objective of establishing a limit to liability so that air carriers may find companies willing to insure them, since air carriers may avoid significant interest charges by avoiding delay in the disposition of claims." 722 F.2d. at 264.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue presented to this Court is whether prejudgment interest may be awarded in addition to the damages award under the Warsaw Convention and Montreal Agreement when a passenger engaged in international travel suffers death or bodily injury, even if the award of interest would exceed the contractual limit to be paid by the carrier pursuant to the Montreal Agreement. The Warsaw Convention, adhered to by the United States in 1934, is a multinational treaty governing international air carriage. The Convention limited the carrier's liability to 125,000 Poincare francs or approximately $8,300 U.S. dollars, unless the carrier and passenger agree to a "special contract" providing for a higher limit of liability. Dissatisfaction with the low limitation of liability led the United States to denounce the Warsaw Convention in November, 1965. The Montreal Agreement of 1966 represented an attempt to prevent the United States' withdrawal from the Warsaw Convention. The Montreal Agreement is a "special contract" under the Warsaw Convention which increases the liability limitation for all international transportation that includes a point in the United States as a point of origin, destination or agreed stopping place.

1. (a) The award of prejudgment interest is consistent with the purposes of the Warsaw Convention and

Montreal Agreement. Article 22(1) of the Convention states that the liability of the carrier for each passenger shall be limited to 125,000 francs or approximately U.S. $8,300. That limit was increased by the Montreal Agreement which provides for a U.S. $75,000 limit, inclusive of legal fees and costs, or $58,000 exclusive of legal fees and costs in countries where the courts separately award fees and costs. The dual limit system was designed to permit additional items to be awarded to the base damages judgment.

(b) The Warsaw Convention allows two exceptions to its fixed limits of liability. First, the periodic payments provision of Article 22(1) states that in jurisdictions where damages are permitted in the form of periodic payments, "the equivalent capital value of the said payments shall not exceed 125,000 francs." Thus, the Convention recognizes the difference between the present and future value of money. Second, the wilful misconduct provisions of Article 25 deprives the carrier of the liability limitation "if the damages caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct." When read in conjunction with Article 28(2) which provides that "questions of procedure shall be governed by the law of the Court to which the case is submitted," the Warsaw Convention clearly permits interest to be awarded on unlimited judgments.

2. (a) One purpose of the Warsaw Convention and Montreal agreement is to encourage prompt payment of damages by fixing, at a definite level the potential liability of an air carrier and its insurer in the event of death or bodily injury to a passenger. The amount of damages to be paid by the carrier is set at $75,000 under

the system of near absolute liability imposed by the Montreal Agreement when the Agreement forced carriers to waive their defenses available under Article 20 of the Warsaw Convention. The passenger ticket evidences the contract of carriage between the carrier and the passenger. The notice to passengers printed on the ticket sets forth the terms of the contract and provides for the definite sum of $75,000 to be awarded in the event of a breach of contract by the carrier.

(b) The sum of $75,000 to be paid by the carrier in the event of a breach of contract represents liquidated damages. Traditionally, courts have been willing to award prejudgment interest on damages arising out of a breach of contract. Even if a pecuniary versus non-pecuniary standard were to replace the liquidated versus non-liquidated damages standard, the $75,000 award under the Montreal Agreement is a definite sum intended to compensate the plaintiff for pecuniary losses.

3. The Warsaw Convention and Montreal Agreement permit the award of prejudgment interest as reimbursement for delay. When the carrier is clearly and absolutely liable, it is obligated to pay the $75,000 at the moment of the passenger's death. Consequently, interest on that sum earned during the legal proceedings which were required to compel the payment should accrue to the plaintiff, not the carrier. Interest must be awarded to compensate plaintiff when carriers and their insurers use the litigation process to delay unduly the payment of obligations due and owing.

ARGUMENT

I. THE AWARD OF PREJUDGMENT INTEREST IS CONSISTENT WITH THE PURPOSES OF THE WARSAW CONVENTION AND MONTREAL AGREEMENT

A. Warsaw/Montreal Must Be Interpreted Liberally To Give Effect To Its Intent

Interpreting a treaty such as the Warsaw Convention as modified by the Montreal Agreement, involves a consideration of legislative history, the negotiations and the practical construction adopted by the parties. *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). In addition, the fundamental principle that a treaty should be interpreted liberally to give effect to its apparent purposes must also be borne in mind. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966). In a specific reference to the Warsaw Convention, the Fifth Circuit has stated that "[t]he determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention." *Block v. Compagnie Nationale Air France, supra*, 386 F.2d at 336.

B. The Warsaw Convention Was Intended To Protect An Infant Aviation Industry

The United States ratified the Warsaw Convention more than 50 years ago at a time when civil aviation was an infant industry operating aircraft with cruising speeds of 100 miles per hour, ranges of 500 miles and passenger

capacity of 20 persons or less. International aviation for the United States encompassed no more than flights to Canada and Mexico. The planners at Warsaw were prepared to look ahead, however, and its reporter is quoted as saying "[W]hat the engineers are doing for machines, we must do for the law." Lowenfeld, *supra*, 80 Harv.L.Rev. at 498.

These once-primitive machines, through the aid of rapidly advancing technology, now have the capability to fly distances of thousands of miles with hundreds of passengers at supersonic speeds. The law, with many forward looking decisions in the federal courts, is trying to keep pace within the framework permitted by the treaty. *See Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984). The Warsaw Convention as conceived in 1929 and ratified by the United States in 1934, had the two-fold object of uniformity and the limitation of potential liability. The first goal, uniformity, was applied to passenger tickets and freight waybills as well as procedures for the handling of passengers and cargo in international transportation. To achieve the second goal, the Convention limited the liability of the carriers in the event of passenger injury or cargo loss or damage. The liability limitation agreed upon for a passenger's death or injury was 125,000 Poincare francs, or approximately 8,300 U.S. dollars.

C. The Warsaw Convention Permits Exceptions To Its Fixed Limits of Liability

While the Warsaw Convention establishes a fixed limit of liability, that limit is not absolute. The first exception to the limitation of liability is contained in Article 22 which provides for either a lump sum payment of damages or periodic payments pursuant to the "law of

the court" to which the claim for damages was submitted.[7] Article 28(1) establishes jurisdiction over the international carriers while Article 28(2) provides that "questions of procedure shall be governed by the law of the court to which the case is submitted".

Thus, although a ceiling on "damages" was established, periodic payments could exceed the limitations so long as the "capital value", or the awarded "damages" did not exceed $8,300 under the Convention. Further, the courts of each country may follow their own "procedures" in deciding Warsaw issues. Since interest is assessed in the United States after the damage award is determined, it does not affect the "damages" contemplated by the Convention. There can be no other interpretation of periodic payments which exceed the damage award other than a payment of interest. Whatever the label, "interest is interest". Rothschild, *Prejudgment Interest: Survey and Suggestion*, 77 Nw.L.Rev. 192, 206 (1982).

The second exception to the fixed limitation of liability is contained in Article 25 which deprives the carrier of the liability limitation "if the damages caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." Thus, the Warsaw Convention permits

[7] Article 22(1) provides:

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payment shall not exceed 125,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability."

interest on an unlimited judgment if the jurisdiction of the "court to which the case is submitted" allows post-judgment and/or prejudgment interest. Eastern would have the court prohibit interest on judgments of $75,000 or less, but permit interest on judgments which could amount to many more thousands of dollars. The same is true if the carrier fails to give notice of the liability limitation. Clearly, Warsaw/Montreal does *not* prohibit interest on judgments. If Mahfoud had alleged and proved wilful misconduct or lack of notice, his case in the Eastern District of New York would have been tried under the New York or Louisiana wrongful death statutes, both of which provide for prejudgment interest on damages awards.[8]

D. The Hague Conference Proceedings Support The Award of Prejudgment Interest In Excess of the Limitation of Liability

The Hague Conference was convened in September, 1955. The United States sent a delegation with the primary mission of increasing the liability limitation of the Warsaw Convention. The chairman of the United States delegation proposed an increase in the damage award, pointing out that "It was well known, . . . , that attorney's fees and expenses of a trial absorbed a great part of the compensation, so that the sum actually received was often much less than the limit provided. Therefore, to preserve full recoveries for injured parties the United States suggested that, if the plaintiff were forced to go to trial, the defendant should be compelled

[8] *See* N.Y. Est. Powers & Trusts Law § 5-4.3(a) (interest awarded from date of death); La. Rev. Stat. Ann. § 13:4203. It is interesting that Eastern does not argue against interest per se on Warsaw/Montreal judgments, but only if the interest award exceeds the $75,000 damages limitation.

to pay a reasonable attorney's fee, which should not exceed the limit by more than 25 percent." Lowenfeld, *supra*, 80 Harv.L.Rev. at 507. This produced many objections from the European delegates who pointed out that "[w]henever a case went to trial and judgment, legal fees were awarded as a matter of course. In some countries such as Germany, fees were awarded with fixed schedules; in others such as England, they were awarded without the benefit of a schedule. But in either event the losing party paid for the costs of litigation, including the fees of the prevailing party's lawyer. No one outside the United States had previously thought that the Warsaw Convention prevented a charge on the defendant for the plaintiff's costs." *Id.* at 508. Thus, from the very beginning, many of the Warsaw signatories, with the exception of the United States, believed that the limitation set out in Article 22(1) could be exceeded by attorneys' fees, costs, interest or other items. For various reasons, but possibly because of the low damages limitation, Congress never saw fit to burden the United States with the Hague Protocol.[9]

E. The Montreal Conference And Agreement Dual Limit System Permits Additional Items To Be Awarded To The Base Damages Judgment

1. Modern Dissatisfaction With The Low Limits of Liability Under The Warsaw Convention

The United States' longstanding dissatisfaction with the artificially low limits of liability contained in Warsaw culminated in a formal notice of denunciation of the

[9] The Hague Protocol is officially known as the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371.

Convention on November 15, 1965. Lowenfeld, *supra*, 80 Harv.L.Rev. at 546-52. Two months after the denunciation was filed, the United States sent a delegation to the Montreal Conference as part of a continuing effort to both cooperate with the European carriers and to establish a workable liability limitation. The Conference was convened in February 1966 in an attempt to prevent the withdrawal of the United States from the Warsaw system. The chairman of the United States Delegation was A. F. Lowenfeld and his mission was to increase the liability limitation to $100,000 per passenger. *Id.* at 564.

The "dual" system for the award of damages, with or without attorneys fees and costs, was afforded early discussion at Montreal. The German Delegation pointed out that "if, as the United States said, the American legal system in effect made allowances for lawyer's fees, known to be high, there was no need to make corresponding allowance for legal fees in countries where the fees were lower and were in any event separately awarded. Accordingly, the German Delegation suggested that the American proposal be amended to call for $100,000 including legal fees and costs, or $70,000 excluding fees and costs—depending upon the legal system of the country where the claim was brought." *Id.* at 568. This proposal was acceptable to the United States and is further indication that the reason for attorneys fees and costs being "inclusive" was to satisfy the European countries and had nothing to do with interest.

Despite the failure of the Montreal Conference, further discussions took place in attempts to avert the withdrawal of the United States from the Warsaw Convention. On May 14, 1966, the United States withdrew its Notice of Denunciation and the Montreal Agree-

ment was formally filed with and approved by the Civil Aeronautics Board as CAB No. 18900.[10]

2. The Silence of the Warsaw Convention and Montreal Agreement Supports the Award of Prejudgment Interest

The Montreal Agreement consists of the following documents: (1) an agreement signed by each airline in which the airline states that it will file a tariff with the Civil Aeronautics Board, give notice to passengers on the ticket and give twelve months advance written notice of withdrawal (Appendix A-1); (2) a CAB tariff under which the airline agrees to waive defenses under Article 20(1) of Warsaw and agrees to waive the liability limitations of Article 22 up to $75,000 or $58,000 plus attorneys fees and costs (Appendix A-2); (3) a notice to passengers of the liability limitation; and (4) the CAB order approving the tariff.

None of these documents, which are the "Montreal Agreement," touch upon interest in the slightest. In fact, there are no magical words in the required tariff (Appendix

[10] British comments on Montreal were as follows:

> "It will be noted that the agreement, so far as it has more than merely contractual force, derives its authority in law from its approval by the Civil Aeronautics Board acting under United States legislation, though its text was filed with other governments as required by their own law. The agreement does not have any formal status in international law, and is not part of the Warsaw system of international instruments. In actual practice, however, it is treated as if it were a limited amendment of the Convention.
>
> "The agreement came into force between the original signatories upon its approval by the board. Other carriers may become parties to it by signing a counterpart of the agreement and depositing it with the board. Any carrier may withdraw by giving twelve months written notice to the board and the other parties." I Shawcross and Beaumont, *Air Law* §§ 33, 344 (4th ed. 1977) (citations omitted).

A-2) which deny an award of interest, or make interest an element of damages, as Eastern would have the Court believe. It is no different than any other air carrier tariff routinely filed with the CAB.[11]

The Montreal liability system is based on a combination of treaty, contract and administrative approval. The Department of State with the support of the Civil Aeronautics Board ["CAB"] and the Federal Aviation Administration ["FAA"] produced the agreement. Thus, its "legislative history" includes the public statements made by these entities as well. The documentary basis of the agreement also includes memoranda from the State Department to the Senate and press releases issued by both announcing the agreement. *See generally* I Kreindler, *Aviation Accident Law* § 12A.02 (1984).

The tariff filed by Eastern provides in pertinent part:

> "The limit of liability for each passenger for death, wounding or other bodily injury should be the sum of U.S. $75,000 inclusive of legal fees and costs."

Evidence that the $75,000 limitation was not intended to be inclusive of interest is suggested by the language appearing in other related documents. The notice to passengers agreed upon at Montreal and printed by Eastern on the tickets issued to Bernard and Odile Mahfoud states that Eastern's "liability . . . for death of or personal injury to passengers is limited. . . . to *proven* damages not to exceed U.S. $75,000 per passenger." 14 C.F.R. § 221.175 (emphasis added).

Further reference to "provable" damages is contained in the Department of State Memorandum to Members of the United States Senate, entitled "United States Government Action Concerning the Warsaw Convention,"

[11] The notice requirements are set forth in 14 C.F.R. § 221.175.

May 5, 1966, p. 4, explaining developments leading to the then proposed Montreal Agreement:

> "Claimant would be able to recover the amount of his *provable* damages, though subject to a maximum limitation of a $75,000." (emphasis added). I Kreindler, *Aviation Accident Law* § 12A.07[1].

The press release issued by the CAB on May 13, 1966, indicates the intent of the new system and states in pertinent part:

> "The Civil Aeronautics Board announced today that it had issued an order approving an agreement between United States and foreign air carriers concerning the liability of these carriers under the Warsaw Convention. The agreement will have the effect of increasing the limit of liability of the participating carriers for death or injury to passengers in international air transportation up to $75,000 for *provable* damages." CAB Press Release 66-61; 382-6031, May 13, 1966, *reprinted in* I Kreindler, *Aviation Accident Law* § 12A.07[1]. (emphasis added).

Interest, on the other hand, is defined as "the compensation allowed by law or fixed by the parties for the use or forebearance or detention of money." Interest is the product of a computation; a ministerial function performed by the clerk of court after a judgment for damages has been awarded by the trier of fact. Interest is compensation for the use of money. *See*, Rothschild, 77 Nw. L.Rev. at 205-206. "Provable" or "proven" damages are derived from the evidence produced at trial which the jury considers. *See Ruling*, filed April 5, 1983 by the district court for the measure of "proven" damages. R.1120-1142. Research done by counsel for Mahfoud has failed to find any mention of "interest" in records of proceedings on Warsaw/Montreal and/or in the implementing documents, statements or releases made by the

various United States executive departments and agencies. Interest on judgments has been allowed by United States courts for many years and the Warsaw delegates must have been aware "that to extinguish pre-existing rights, their intent and expression must be clear; ambiguity or silence is rarely, if ever, sufficient." *See Husserl v. Swiss Air Transport Company, Ltd.*, 388 F.Supp. 1238, 1246 (S.D.N.Y. 1975), *citing Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966). The only inference that can be drawn from the silence of Warsaw regarding interest on judgments by United States courts is that "the delegates neglected to deal with a problem which they would have wished to resolve if they had been aware of it." 388 F.Supp. at 1246. The logical conclusion to be drawn is that the drafters of the Warsaw Convention would have provided for interest, which was already allowed under United States procedures, if they had been aware that it was an issue. This was accomplished for European courts when it was brought to the attention of the Montreal delegates that attorney's fees and costs in addition to the Warsaw liability limits were routinely paid by European courts to the prevailing party. Lowenfeld, *supra*, 80 Harv.L.Rev. at 567-68.

Respondent submits that the language and history of the Warsaw Convention, as modified by the Montreal Agreement, demonstrate that interest on judgments was not a consideration of the delegates and is not prohibited by Warsaw/Montreal. It was forseeable by Eastern that damages could exceed $75,000.

II. THE CONTRACT OF CARRIAGE ESTABLISHES EASTERN AIR LINES' LIABILITY FOR PREJUDGMENT INTEREST

A. The Passenger Ticket as Contract of Carriage under the Warsaw Convention and Montreal Agreement

Article 22(1) of the Warsaw Convention provides in part that "by special contract the carrier and the passenger may agree to a higher limit of liability" than the $8,300. By the terms of the Montreal Agreement which is a "special contract" between the carrier and the passenger, the limitation of liability was increased in the United States to $75,000.

Both Appellant Eastern and Respondent Mahfoud agree that Warsaw/Montreal applies to this litigation. The passenger ticket evidences the contract of carriage and Mahfoud has not alleged lack of notice or wilful misconduct on the part of Eastern so as to remove the claim from the Montreal limitation. Therefore, at the time of the crash and deaths of Mahfoud's decedents, a valid contract of carriage containing an agreed sum of damages, certain and fixed by contract at $75,000, existed between Mahfoud's decedents and Eastern.

The contract of carriage provided that Eastern was absolutely liable to Mahfoud for damages if it breached the contract for safe transportation.[12] Damages are ascertainable from the agreed limitation in the contract of carriage and thus are "liquidated".

The $75,000 limit is a definite, ascertainable sum which is awarded for a breach of contract for safe carriage. In fact, the basis for the Warsaw/Montreal

[12] *See* Appendix A-2, Montreal liability limitations.

limits of liability rests upon the concept of certainty of damages in order to permit carriers to carry adequate insurance. Secretary of State Cordell Hull explained the Warsaw Convention to the United States Senate in 1934 as follows:

> "It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travellers and shippers in the way of reduced transportation charges. . . . The principle of placing the burden on the carrier to show lack of negligence in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation." Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934).

See also Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

B. Prejudgment Interest is Properly Awarded on Liquidated Damages Arising Out of the Breach of Contract of Carriage

Based on Secretary Hull's statement to the Senate, *supra*, some courts have determined that one of the Convention's main purposes was "to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages." *Reed v.*

Wiser, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). The *Reed* court continued, stating that, "The history of the Convention from the point of adherence by the United States to the present indicates no change in this fundamental purpose." The court then commented on the improved safety record of the airlines and the increased liability limits. "Nevertheless, at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters." *Id.* at 1089.[13]

At least one commentator has argued that this Court has not only acknowledged the importance of awarding prejudgment interest as compensation for delay but has also discredited the distinction between liquidated and unliquidated damages. *See*, Rothschild, *supra*, 77 Nw.L.Rev. at 207. In *Miller v. Robertson*, 266 U.S. 243 (1924), the Supreme Court acknowledged the liquidation requirement but noted that:

> ... when necessary, in order to arrive at fair compensation, the court, in the exercise of a sound discretion, may include interest or its equivalent as an element of damages. *Id.* at 258.

[13] The "more definite and equitable basis on which to obtain insurance rates" would be unaffected by requiring Eastern to pay interest on the $150,000 award ($75,000 for each decedent) from the time that Mahfoud filed his action until the time that Eastern paid that sum into the registry of the court. "As soon as the accident occurred, Eastern knew exactly what its maximum liability under the Montreal Agreement would be: $75,000 times the number of international passengers on board the ill-fated aircraft." *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842, 859 (2d Cir. 1984) (Pratt, J., concurring and dissenting).

The Court prefaced its remarks on the award of prejudgment interest by stating:

> One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity interest is allowed on money due. *Id.* at 257-258.

Thus, prejudgment interest may be awarded on liquidated damages arising out of a breach of contract.

Less than ten years after its decision in *Miller v. Robertson*, this Court discredited the distinction between liquidated and unliquidated damages in *Funkhouser v. Preston Co.*, 290 U.S. 163 (1933). The issue in *Funkhouser* centered on whether or not a New York statute providing for interest on both liquidated and unliquidated claims impaired the obligation of the contract. The Court noted that "[t]he statute in question concerns the remedy and does not disturb the obligations of the contract." *Id.* at 167. More importantly, the Court stated:

> It has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. *Id.* at 168.

The Court seemed, therefore, to have established the right to collect interest as a matter of full compensation even on a claim for unliquidated damages arising out of a breach of contract.

The Supreme Court's apparent rejection of the liquidated versus non-liquidated damages issue in *Funkhouser*, *supra*, may mean that a pecuniary versus non-pecuniary

standard should instead be adopted. *See* Fleming, *Prejudgment Interest: An Element of Full Compensation in Wrongful Death Cases*, U.Ill.L.Rev. 453 (1981); McCormick, *Law of Damages* § 56 (1935). In his discussion of interest on tort claims, McCormick argues that interest should be awarded on those elements of the damages which are pecuniary in nature, as opposed to non-pecuniary claims such as pain and suffering. *McCormick*, § 56, p. 223-225. Certainly the $75,000 award under the Montreal Agreement is designed to compensate for pecuniary injuries, rather than non-pecuniary losses.

The Supreme Court's most recent pronouncement on the issue of prejudgment interest involves a patent infringement suit where damages including interest were awarded pursuant to 35 U.S.C. § 284 which specifically provides for the award of "interest and costs as fixed by the court." *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed.2d 211 (1983). This Court stated that the purpose of an interest award is to ensure that the plaintiff is placed in as good a position as he would have been had the infringement not occurred. 103 S.Ct. at 2062. The Court noted that "[t]he traditional view, which treated prejudgment interest as a penalty awarded on the basis of defendant's conduct, has long been criticized on the ground that prejudgment interest represents 'delay damages' and should be awarded as a component of full compensation". *Id.* at 2063, n.10. *See also* McCormick, *Damages* § 51, p. 206-211; Williams, *Prejudgment Interest: An Element of Damages Not to Be Overlooked*, 8 Cumberland L.Rev. 521 (1977).

A contract exists for safe carriage in the form of the passenger ticket. That contract contains a limitation of liability which is known to both parties. The sum of

$75,000 becomes due and owing in death cases as of the moment of death. The sum of $75,000 represents either liquidated damages or pecuniary losses upon which prejudgment interest must be awarded in the event of delay as a matter of fair compensation.

C. Interest On Damages In Tort Claims

The claim for interest by Mahfoud is one based upon Eastern Air Lines' breach of contract of carriage and does not encompass interest on damages awarded for tort liability. Trial against the United States for damages on the negligence issues was conducted in the Western District of Louisiana and resulted in an award of approximately $1.65 million. The district court found Eastern liable for $75,000 for each death pursuant to the contract of carriage based upon the Warsaw Convention, as amended by the Montreal Agreement.

If tort liability were involved, the same principles regarding interest on contract damages would be applicable. Wrongful death damages are easily ascertainable by reference to established values and accepted computational devices well known to all insurance companies and lawyers who practice negligence law.[14]

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[14] See CAB damages report, Table I(A), Appendix A-5.

On May 14, 1970, the Civil Aeronautics Board (CAB) circulated a questionnaire to the United States Certificated Air Carriers seeking information on recoveries from settlements or court judgments for passenger deaths and serious injuries arising from accidents occurring during the United States air carrier operations during the period 1960 to 1969.

The most significant table on airline recoveries was Table I(A). Not only did the CAB information prove that at least 63.2 percent of American passengers would be unprotected with a $100,000 limit, it also showed that the average recovery for death, in non-Warsaw airline cases in 1970 was almost $200,000.

(Footnote continued on next page)

III. THE WARSAW CONVENTION AND MONTREAL AGREEMENT PERMIT THE AWARD OF PREJUDGMENT INTEREST AS REIMBURSEMENT FOR DELAY

The Warsaw Convention is a valid and existing treaty and constitutes a part of the law of the land. *Block v. Compagnie Nationale Air France, supra* at 804-805.

It is undisputed that Mahfoud's decedents were being transported as passengers for hire by Eastern. Therefore, the Warsaw Convention/Montreal Agreement system applies to this case.

This action for wrongful death arose from the crash of Eastern's flight 66 at John F. Kennedy International Airport on June 24, 1975 and it was not until December 2, 1982 that Eastern deposited $150,000 ($75,000 per decedent) into the registry of the court pursuant to its contract of carriage as established by Warsaw/Montreal. Mahfoud commenced suit on December 4, 1975 and the chronology of events that transpired over the seven years are generally set forth in Respondent's Statement, *supra*, pp. 1-15.

Mahfoud is not seeking "equity or fairness" but has the right under Warsaw/Montreal to be reimbursed by Eastern for use of the plaintiff's money over these seven years. Despite the obvious damages value of the wrongful death cases, the cost to Eastern resulting from the deaths of Mahfoud's two decedents is not $150,000 as

(Footnote 14 continued)
and that the figure has risen rapidly in each of the three preceding years! I Kreindler, *supra*, at 12B-22,23.

In addition, Eastern's "offer of settlement" and the fact that it deposited $75,000 into the registry of the court for the death of each decedent prior to damages trial are obvious admissions that the damages were ascertained.

intended by the Montreal Agreement, but a mere $63,000 if Eastern's calculations are correct, or perhaps even less. Petitioner's Brief at 9.

Since Eastern was clearly and absolutely liable to pay $75,000 per decedent from moment of death, interest on that sum earned during the legal proceedings which were required to compel its payment should accrue to Mahfoud, not Eastern. *See* Rothschild, *supra*, 77 Nw.L.Rev. 192 and cases cited therein.

Airline defendants and their insurers should not have an incentive to use the litigation process in order to reduce cost by delaying payment of monies clearly due and owing. Courts in a variety of contexts have established plaintiff's right to recover prejudgment interest when the defendant has delayed unduly in the payment of obligations due and owing. *See, Royal Indemnity Co. v. United States*, 313 U.S. 289, 295-296 (1941) ("interest by way of damage for delay in payment" awarded on breach of contractual obligation); *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F.2d 541, 554 (5th Cir. 1968) (interest allowed as a matter of Texas law for damages for the detention of money); *Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.*,311 F.2d 389, 399 (4th Cir. 1962) (prejudgment interest awarded to "compensate the plaintiff for the delay in the receipt of its money"); *Triangle Electric Supply Co. v. Mojave Electric Co.*, 238 F.Supp. 815, 818 (W.D.Mo. 1965) (interest is "an assessment of damage for delay in the payment of a contractual obligation").

There was never any intention by the signatories to Warsaw/Montreal that judicial process should be used to delay payment of damages. The United States accepted a $75,000 limit in Montreal with the express provision that the carriers would accept absolute liability for death or injury to passengers so that "litigation would be

reduced, settlements would be quicker and the value of plaintiffs' recoveries would . . . be substantially greater than under the Warsaw system". Lowenfeld, *supra*, 80 Harv.L.Rev. at 587. Further, "one of the principal advantages of the proposal was thought to be that settlement would begin immediately . . ." *Id.* at 593. In regard to quicker and less expensive settlements, Mr. Lowenfeld reports:

> "But in the present context of acceptance of a limit on liability at a level lower than the desired goal, absolute liability was viewed primarily in terms of the prospect of quicker and less expensive settlements with less time and less money going for litigation than would have prevailed under the common law system, had the denunciation gone into effect. Experience has shown that in major personal injury and death cases litigation and delay seriously impair the value of the compensation eventually awarded.
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> The attraction of absolute liability was that it would benefit most those who needed the damage payments most urgently—the dependents of a bread winner of modest means. For example, if the widow and children of a school teacher killed while he was on a excursion flight to Europe could get paid quickly at or near the limit, they would be far better off than if they had to go through painstaking accident investigation and litigation, which might take several years to complete and result in net payments to them of 30 to 50% less than the gross amount awarded.
>
> Essentially, then, the success of the arrangement will depend on the accuracy of the prediction that cases would be settled quickly and economically." *Id.* at 600.

Early payment of damages was one of the prime factors considered by the United States in its acceptance of the Montreal provisions. The Department of State press release of May 13, 1966 stated in part as follows:

> The Department of State, in consultation and with the concurrence of the Civil Aeronautics Board, and the Federal Aviation Agency, the Department of Commerce and the Department of Defense, has concluded that the interests of the United States travelling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention under a plan the essential features of which are:
>
> First. The limits of international carrier liability for passengers will be increased from $8,300 to $75,000 per person. Those travellers who wish to carry greater protection will be free to take up additional insurance to cover their needs. There will be no limit on liability where the carrier is guilty of willful misconduct.
>
> Second. Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases." Department of State Press Release No. 110, May 13, 1966. Appendix A-3.

The judicial process is designed to provide a fair, just and speedy disposition of cases. To meet this responsibility a defendant must not be permitted to benefit from delays between injury and trial so as to gain interest on pecuniary amounts owed to the claimant. The harm is aggravated should the defendant use or misuse the legal process for its own pecuniary gain. Even when the defendant may not be liable for the delay, as between an airline whose liability is not seriously questioned and

plaintiffs who suffered substantial loss as a result of the airline's negligence, it is grossly inequitable to permit the defendant to gain substantial interest each day by use of money rightfully belonging to the claimant.

Should Eastern be permitted to retain the interest on the use of the $150,000 contractual damages belonging to Mahfoud, Eastern will be unjustly enriched.

This litigation has been protracted through no fault of Mahfoud.[15] In the seven years prior to Eastern's motion for summary judgment pursuant to Warsaw/Montreal, Eastern had never volunteered to pay contract of carriage damages. Eastern opposed Mahfoud's efforts to obtain a judgment at every stage, and after being adjudged negligent and liable to its passengers by jury verdict, still failed to pay the contractual damages it owed pursuant to the absolute liability provisions of Warsaw/Montreal. It misled the courts with a spurious defense of lack of capacity to sue for years, knowing full well that no such defense existed and that Mahfoud could not counter the defense until the time of the damages trial. At a convenient time for its own purposes, just before trial on damages, the so-called capacity defense was voluntarily withdrawn by Eastern.

---

[15] Eastern was found negligent and liable October 25, 1978 by jury verdict, two years before summary judgment awarded to Mahfoud was reversed by the Second Circuit. As it was the intention of the district court to remand the Louisiana cases for damages trials, and to have the Louisiana courts determine capacity to sue, a second motion for summary judgment by Mahfoud would have been a useless act and waste of judicial time and effort. *See, Winbourne v. Eastern Air Lines, Inc.*, 479 F.Supp. 1130, 1142 (E.D.N.Y. 1979), *rev'd on other grounds*, 632 F.2d 219 (2d Cir. 1980).

Eastern, having previously opposed Mahfoud's efforts to obtain judgment pursuant to Warsaw/Montreal, is now seeking protection of its liability limits, free of any responsibility for the funds it has retained at Mahfoud's expense and to its own pecuniary advantage.

Therefore, to preserve the integrity of the Warsaw/Montreal purposes, and to dissuade airlines and/or their insurers from protracting litigation or unduly delaying payment to an injured passenger, interest must be awarded on the judgment rendered pursuant to the Warsaw Convention and Montreal Agreement.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit is fully supported by the Warsaw Convention and Montreal Agreement. For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 17, 1984

APPENDIX

APPENDIX

MONTREAL AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government.

[insert Tariff]

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

[insert Notice]

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended and filed with other governments as required. The agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving Twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

Reprinted in I Kreindler, *Aviation Accident Law* § 12A.03 at 12 A-4 (1984).

TARIFF

The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

(1) The limit of liability or each passengrer for death, wounding or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Covnention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

Reprinted in I Kreindler, *supra*, § 12A.04 at 12A-7.

DEPARTMENT OF STATE
FOR THE PRESS

May 13, 1966
No. 110

The Department of State, in consultation and with the concurrence of the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Commerce, and the Department of Defense, has concluded that the interests of the United States travelling public and of international civil aviation would be best served by the continuing within the framework of the Warsaw Convention under a plan the essential features of which are:

First. The limits of international carrier liability for passengers will be increased from $8,300 to $75,000 per person. Those travellers who wish to carry greater protection will be free to take out additional insurance to cover their needs. There will be no limit on liability where the carrier is guilty of wilful misconduct.

Second. Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases.

Third. International airlines carrying well over 90 percent of Americans in international travel are participating in the plan. The recommendation of the Senate

Foreign Relations Committee that no airline operating within the United States remain outside the plan has been substantially complied with. Those United States airlines which initially declined to come within the plan have now indicated their agreement to accepting an increase in liability from $8,300 to $75,000.

Fourth. This is an interim arrangement terminable on twelve months' notice. In the months ahead public hearings will be held for the purpose of determining the definitive United States position in preparation for further international discussions concerning the Warsaw Convention.

Fifth. The international carriers who have notified the Civil Aeronautics Board of their acceptance of the interim arrangements are: Aeronaves, Air Canada, Air France, Air India, Aer Lingus, Alitalia, BEA, BOAC, Canadian Pacific, CMA, El Al, Icelandic, Ibera, Japan Air Lines, KLM, Lufthansa, Olympic, Philippine Airlines, Quantas, Sabena, SAS, Swissair, Varig and VIASA; American, Braniff, Continental, Eastern, Northeast, Northwest, Pan American, Panagra, TWA and Western. The following United States airlines mainly engaged in domestic carriage which have accepted the increased limits of liability but not the feature of absolute liability are: Delta, National and United. It is expected that other carriers will join the plan.

Sixth. Those guilty of sabatoge and persons claiming on their behalf will not be entitled to recovery any damages.

By acceptance of the plan the United States and all of the other participating countries have assured the continuation of the uniform system of law governing airlines, shippers and passengers and have demonstrated again

the viability of the system of international cooperation in civil aviation and in international law.

Reprinted in I Kreindler, *supra*, § 12A.-07[3] at 12A-15, 16.

• • •

CAB TABLE I(A)

Non-Warsaw Death Settlements Exceeding Stated Amount By Settlement Year

RECOVERY AMOUNT	1966 No	%	1967 No	%	1968 No	%	1969 No	%	1970 No	%
$ 1,000	110	95.7	67	96.8	160	100.0	157	99.6	117	100.0
10,000	94	81.8	50	72.2	152	95.3	152	96.4	115	98.2
50,000	47	41.0	24	34.6	69	43.3	98	62.2	86	73.4
75,000	39	34.0	18	25.9	63	39.5	86	54.6	80	68.3
100,000	32	27.9	14	20.1	54	33.9	75	47.6	74	63.2
125,000	28	24.4	13	18.7	48	30.1	69	43.8	70	59.8
150,000	21	18.3	12	17.3	45	28.2	61	38.7	68	58.1
200,000	12	10.5	8	11.5	30	18.8	43	27.3	57	48.7
250,000	5	4.4	3	4.3	20	12.5	31	19.7	42	35.9
300,000	3	2.7	2	2.9	12	7.5	16	11.2	28	23.9
500,000	115	1.8	0	0	1	.6	2	1.3	2	1.7
Total Settlements (619)	115		69		160		158		117	

Reprinted in I Kreindler, *supra*, § 12B.02[6] at 12B-22, 23.

REPLY

BRIEF

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No. 83-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EASTERN AIR LINES, INC.,
Petitioner,

v.

ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

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ROBERT F. MAHFOUD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

The Warsaw Convention as supplemented by the Montreal Agreement limits an air carrier's liability for the death or bodily injury of an international passenger to $75,000, including attorneys' fees and costs.[1] The sole is-

---

[1] The full title of the Warsaw Convention is The Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note. The full title of the Montreal Agreement is the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900 (approved by the U.S. Civil Aero-

sue in this case is whether that $75,000 limit includes the carrier's liability, if any, for prejudgment interest.

As shown in petitioner Eastern's opening brief, the language, purposes, and history of the Warsaw Convention and Montreal Agreement establish that an award of prejudgment interest over and above the $75,000 limit of liability is precluded. Respondent Mahfoud's brief fails for the most part even to address Eastern's analysis of the plain language and history of these international agreements. Instead, respondent frequently focuses on the wrong question, by arguing on various alternative grounds —but without reference to the *limitation* of a carrier's liability—that prejudgment interest may be awarded in cases arising under the Convention and the Agreement. Eastern does not dispute that prejudgment interest may be available as part of a damages award in such cases, if permitted by the applicable local law, so long as the total award does not exceed the $75,000 limit of liability. But as we show below in Part I, the very provision of the Convention that leaves to local law the categories and measurement of recoverable damages (including prejudgment interest) also makes clear that all elements of a plaintiff's recovery are subject to the limit of liability.

To the extent that Mahfoud does address the limitation of liability, he appears to argue that the $75,000 limit applies only to "damages" and that prejudgment interest is not an element of damages. Mahfoud further argues that the Warsaw Convention and the Montreal Agreement reflect a policy of encouraging the prompt payment of passenger claims; that an award of prejudgment interest over and above the $75,000 limit is necessary to prevent a carrier from unilaterally delaying the payment of valid claims; and that, accordingly, it is appropriate to award

---

nautics Board, Order No. E-23680, 31 Fed. Reg. 7302 (1966), *reprinted at* 49 U.S.C. app. § 1502 note). The text of the Montreal Agreement is reprinted in the Appendix to Eastern's opening brief.

such interest over and above the carrier's liability limit. We address these arguments below in Parts II and III.

I. THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT DO NOT REGULATE WHETHER PREJUDGMENT INTEREST IS RECOVERABLE, BUT DO SUBJECT PREJUDGMENT INTEREST, IF RECOVERABLE, TO THE LIMIT OF LIABILITY.

Much of respondent's brief is devoted to establishing a proposition not at issue here—*i.e.*, that, apart from the limit of liability, prejudgment interest is allowable on claims arising under the Warsaw Convention and the Montreal Agreement. See Resp. Br. i. Thus, respondent urges that prejudgment interest may be awarded where the carrier's wilful misconduct renders the limit inapplicable (Resp. Br. 16, 21); that Article 28(2) of the Warsaw Convention, which provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted," authorizes the award of prejudgment interest here pursuant to the New York or Louisiana wrongful death statutes (*id.* 21); and that a wrongful death claim subject to the Montreal Agreement is essentially a claim for "liquidated" contract damages on which prejudgment interest may be awarded (*id.* 28).[2]

---

[2] Alternatively, respondent argues that even if the "contract" damages under the Warsaw Convention and the Montreal Agreement are unliquidated, they are "pecuniary" damages (Resp. Br. 31-32); and even if the claim sounds in tort, it is a wrongful death claim for which damages are "easily ascertainable" (*id.* 33), but see *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 76 L. Ed. 2d 768, 789 (1983) (even calculation of lost earnings, the most objective element of a wrongful death damages award, must by its very nature be a "rough approximation"). In the same vein, the brief *amicus curiae* in support of respondent asserts that prejudgment interest is available because passenger claimants have a property interest in damages under the Convention and the Agreement (Amicus Br. 24-25). We do not address these arguments individually since they are not directed to the permissibility of an award of prejudgment interest over the $75,000 limit of liability.

Although Mahfoud strives to establish an undisputed point—that the Warsaw Convention as supplemented by the Montreal Agreement does not flatly bar an award of prejudgment interest—respondent's analysis in support of that point is faulty in a telling respect. It is Article 24 of the Warsaw Convention, not Article 28, that permits awards of prejudgment interest pursuant to local law. Thus, Article 24 provides:

> "(1) In the cases covered by articles 18 and 19 [liability for damage to baggage or cargo and for transportation delays, respectively] any action for damages, however founded, can only be brought subjection to the conditions and limits set out in this convention.
>
> "(2) In the cases covered by article 17 [liability for death and bodily injury of passengers] the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

One function of Article 24 is to make clear that the Convention neither determines who has a right to bring an action for death or injury nor regulates the types of damages that may be recovered. Rather, the Convention leaves those questions to the law of the forum, including the forum's choice of law rules. Pet. Br. 20 n.14, 32 n.28. See, *e.g.*, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.) (Marshall, J.), *cert. denied*, 382 U.S. 816 (1965) (Warsaw Convention leaves to local law the question whether damages may be recovered for mental pain and anguish); H. Drion, *Limitation of Liabilities in International Air Law* 125-26 (1954); N. Matte, *Treatise on Air-Aeronautical Law* 382-83, 419-20 (1981); G. Miller, *Liability in International Air Transport* 125, 248-49 (1977).[3] In the present case, Article 24 thus authorized

[3] Thus, respondent's reliance on Article 28(2), which refers "questions of procedure" to the law of the forum, is misplaced.

the district court to apply Louisiana's choice of law principles to determine what law governed Mahfoud's damages, and, after determining that Louisiana's law of damages governed, to apply the Louisiana prejudgment interest statute applicable to tort judgments. J.A. 69-79; J.A. 83-85.

The second function of Article 24 is to establish that whatever the components of the recoverable damages may be under local law, they are all subject to the limit of liability. See H. Drion, *supra*, at 113-14, 125-26; *In re Mexico City Aircrash*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (nations may provide for varying measures of damages, but Article 24(1) ensures that such variations in local or national law will not lead to circumvention of the liability limit).[4] Article 24 plainly states that "any ac-

Article 24(2) shows that the Convention's drafters regarded the questions of capacity to sue and recoverable damages as questions of substantive law, not procedure. See Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66, 66-68 (1981). This conclusion is confirmed by the drafting history of Article 24(2). A CITEJA draft convention of 1928 provided that these questions would be determined by the "national law of the deceased or, in the absence thereof, according to the law of his last domicile." See *id.* at 67. But as one commentator has explained, "[t]his choice of law rule was, after discussion, abandoned to leave the solution of the question to general principles of private international law and to the internal legislation of States." *Id.* at 67. See *Minutes of the Second International Conference on Private Aeronautical Law, Warsaw, 1929*, at 255 (R. Horner & D. Legrez trans. 1975) (report of CITEJA), *quoted in* Pet. Br. at 32 n.28.

[4] Although the English translation of Article 24(1) provides that "any action for damages, however founded," is subject to the conditions and limits set out in the Convention, the word "damages" in this provision should not be read narrowly. Under Article 36, the sole official language of the Convention is French, and the French text of Article 24(1) refers to the "action en responsabilité." 49 Stat. 3006. As the Ninth Circuit recently noted, a more literal translation of "responsabilité" would be "liability" rather than "damages." *In re Mexico City Aircrash*, *supra*, 708 F.2d at 412-13 n.22. For a discussion of how a United States court

tion for damages, however founded, can only be brought subject to the conditions and limits set out in this convention."

In sum, Article 24 authorizes an award of prejudgment interest if such an award is permitted by local law; at the same time, however, it makes clear that prejudgment interest may not be awarded over and above the $75,000 limit.[5]

II. THE MONTREAL AGREEMENT LIMITS THE CARRIER'S TOTAL LIABILITY, NOT JUST ITS LIABILITY FOR "DAMAGES," AND, IN ANY EVENT, PREJUDGMENT INTEREST IS AN ELEMENT OF DAMAGES.

To the extent that respondent addresses the effect of the $75,000 limit of liability, his primary argument ap-

should approach the problem of interpreting the official French text of the Warsaw Convention, see *Denby* v. *Seaboard World Airlines, Inc.*, 737 F.2d 172, 177 (2d Cir. 1984).

[5] To support his argument that interest is allowable on claims subject to the Warsaw Convention and Montreal Agreement, respondent also points to the periodical payments provision of Article 22(1) (Resp. Br. 20). As explained in our opening brief (Pet. Br. 23-24), however, the true significance of the periodical payments provision for the present case is twofold. First, this provision shows that an express modification to the flat limit on liability was necessary to permit an award of periodical payments over time that would total more than the 125,000 franc limit established by Article 22(1), even though the present value of such payments would be economically equivalent to a lump sum payment of 125,000 francs. Second, as respondent suggests, this provision does recognize the time value of money—the basis for interest—but it does so only in a highly limited postjudgment context that in no way authorizes an award of prejudgment interest over and above the limit. Compare Article 20(11) of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, *done* at Rome, Oct. 7, 1952, *reprinted in* A. Lowenfeld, *Aviation Law* 1003, 1012 (2d ed. Doc. Supp. 1981), which, in dealing with the enforcement of one jurisdiction's judgment in another jurisdiction, provides for 4 percent postjudgment interest.

pears to be that the limit applies only to "damages" and that prejudgment interest is not an element of damages (Resp. Br. 16, 20, 22, 25-29).[6] Both aspects of this argument are incorrect.

1. Article 22(1) of the Warsaw Convention fixes a limit on the "liability of the carrier for each passenger." By its terms, this limitation of liability is not confined to "damages" (Pet. Br. 18-19). Similarly, the Montreal Agreement fixes the carrier's "limit of liability for each passenger," and that limitation is not restricted to "damages" (*id.* 19). Indeed, the Montreal Agreement's $75,000 limit expressly includes legal fees and costs. Thus, respondent's attempt to restrict the scope of the $75,000 limit to "damages," and, in particular, to recoverable damages measured as of the date of the accident or the filing of the complaint, is flatly contrary to the Montreal Agreement's plain language.[7]

[6] But see Resp. Br. 32-33 (quoting and citing authorities to the effect that prejudgment interest is an element of compensatory damages).

[7] This Court's decisions insist that treaties and international agreements must be interpreted in accordance with their plain and ordinary meaning. *E.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982); *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821). Such strict adherence to the ordinary meaning of the text is based on the recognition that international agreements are drafted by knowledgeable persons competent to express their meaning and are intended to serve international, not parochial, purposes. See Pet. Br. 17-18. The *amicus* urges, however, that the Montreal Agreement is formally a "special contract" under Article 22(1) of the Warsaw Convention, and that the Agreement therefore is a simple contract not subject to the principles governing the interpretation of international agreements (Amicus Br. 17). But the Montreal Agreement is not a simple contract between the carrier and the passenger. The Agreement can be neither understood nor applied apart from the multilateral treaty that it supplements, the Warsaw Convention. It is the Convention that establishes the entire framework for an air carrier's liabiliy to an international passenger, including the limitation of the carrier's liability. The Montreal Agreement is limited in scope to undertakings by the carrier (1) to be

Further, the origins of the Montreal Agreement's dual limits of liability—$75,000 inclusive of attorneys' fees and costs, and $58,000 exclusive of fees and costs in nations "where provision is made for separate award of legal fees and costs"—also make clear that the $75,000 limit encompasses the carrier's total liability, not just its liability for damages as of the date of the accident or complaint. Eastern's opening brief traces the history of the dual limits in some detail, from the initial recognition at The Hague in 1955 that different national practices re-

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liable up to a limit of $75,000 including legal fees and costs, or $58,000 excluding fees and costs, and (2) to waive the Warsaw Convention defense that it took "all necessary measures to avoid the damage" (Article 20(1)). Thus, the Warsaw Convention and the Montreal Agreement must be read together in light of "the historical and functional relationship of the Agreement to the Convention." *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85, 90 (2d Cir.), *cert. denied*, 52 U.S.L.W. 3264 (U.S. Oct. 3, 1983). See also Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 597 (1967) [hereinafter "Lowenfeld"]. Indeed, even respondent notes that the Montreal Agreement is "'treated as if it were a limited amendment of the [Warsaw] Convention.'" Resp. Br. at 24 n. 10, *quoting* I Shawcross & Beaumont, *Air Law* ¶ 344 (4th ed. 1977).

Furthermore, the reasons underlying this Court's strict adherence to the text of international agreements are fully applicable to the Montreal Agreement. That Agreement was drafted with the participation of the United States government, foreign governments, international organizations, and numerous international carriers. See Lowenfeld, *supra*, 80 Harv. L. Rev. at 593-96; *see also* U.S. Dep't of State Press Release No. 110 (May 13, 1966), *reprinted in* 54 U.S. Dep't of State Bull. 955, 955-56 (1966). Moreover, the Agreement was largely based on a proposal that recently had been advanced and debated at an international conference in Montreal. See Pet. Br. 37-41. Thus, the Montreal Agreement was carefully drafted and considered by knowledgeable persons competent to express their meaning. Moreover, the Agreement was made applicable not only to cases brought in U.S. courts, but to all cases arising from international air carriage that includes a point in the United States; hence it must not be given a parochial interpretation.

specting the award of attorneys' fees could engender disparate applications of the Warsaw Convention limit, through the 1966 adoption in the Montreal Agreement of dual limits designed to reconcile those differences (Pet. Br. 20-21, 34-36, 37-41). Mahfoud's brief fails to refute the three points we drew from that history, each of which renders untenable any attempt to restrict the scope of the $75,000 limit to "damages."

First, at The Hague in 1955, the United States delegation sought and secured an amendment to the Warsaw Convention providing that the Convention's limit of liability did not prevent a court from awarding, over and above the limit, the plaintiff's legal fees and costs. The United States delegation understood that, absent this amendment, American courts could not award legal fees and costs independently of the Convention's limit on the "liability of the carrier for each passenger" (Pet. Br. 34-36). This understanding is inconsistent with respondent's position that the limit encompasses only "damages." [8]

Second, as respondent notes (Resp. Br. 21-22), certain other nations' delegations at The Hague did not view the Convention's limit of liability as precluding an award of legal fees and costs independent of the limit. See Pet. Br. 35. In those nations, legal fees and costs were awarded as a matter of course to prevailing parties, and this routine obligation of a losing litigant was considered to be independent of the Convention's limit on the "liability of the carrier for each passenger." There is, however, no evidence that prejudgment interest was consid-

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[8] As explained in Eastern's opening brief, the United States has not ratified the Hague Protocol to the Warsaw Convention (Pet. Br. 34-36). But the international deliberations and decisions that occurred at The Hague in 1955 are relevant to the present case because they reflect the signatory nations' understanding of the unamended Warsaw Convention and also constitute part of the background for the adoption of the Montreal Agreement's dual limits.

ered by any nation to be independent of the Convention's limit on "the liability of the carrier for each passenger." Unlike responsibility for legal fees and costs in nations that follow the English rule on "costs," a carrier's liability for prejudgment interest is by its nature necessarily part of the "liability of the carrier for each passenger," since such interest is intended to bring calculation of the plaintiff's damages up to date to provide full compensation for the loss arising from the passenger's injury or death. See *infra*, pp. 10-11.

Third, the Montreal Agreement adopted a "split-level" limit of liability to reconcile these different national practices regarding litigation costs (Pet. Br. 19-21, 38-41). In nations where "provision is made for separate award of legal fees and costs," the limit is $58,000 exclusive of the one item ever considered to be independent of the limit on the carrier's liability for the passenger—legal fees and costs. In nations such as the United States, the limit is $75,000 without exception—even legal fees and costs are included. Thus, the $75,000 limit of liability encompasses all elements of a plaintiff's recovery, not just "damages" as respondent suggests.

2. Respondent's contention (Resp. Br. 25-27) that prejudgment interest is not a type or element of damages is also mistaken. As the authorities cited in our opening brief recognize (Pet. Br. 21-23), an award of prejudgment interest in a wrongful death case is designed to bring the calculation of the plaintiff's damages arising from the death up to date as of the time judgment is entered. Thus, for example, the decedent's estimated lost future earnings may be discounted back to the date of the accident, and "[t]he plaintiff may then be awarded interest on that discounted sum for the period between injury and judgment, in order to ensure that the award when invested will still be able to replicate the lost [income] stream." *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 76 L. Ed. 2d 768, 784 n.22 (1983). In short, contrary to

respondent's suggestion (Resp. Br. 25-27), prejudgment interest is one element of compensatory damages.

Respondent Mahfoud also argues that, in any event, prejudgment interest is not one of the types of "damages" encompassed in the limitation. According to respondent, the Montreal Agreement's limit of liability is a declaration of liquidated damages owed to the plaintiff on the date of the accident (Resp. Br. 29-33). Thus, he argues that the Agreement fixes the carrier's liability at the time of an accident to "a definite, ascertainable sum [of $75,000] which is awarded for a breach of contract for safe carriage." (*Id.* 28). Because the $75,000 "becomes due and owing in death cases as of the moment of death" (*id.* 33), damages for delay in payment are not subject to the limit of liability (*id.* 28-35).

Respondent's argument founders on the fact that the Warsaw Convention and the Montreal Agreement do not establish liquidated damages for a passenger's death or injury.[9] Neither liability nor the amount of damages are

[9] Respondent is also in error in characterizing his recovered damages as "contract" damages. It is true that the applicability of the Warsaw Convention is premised upon a "contract of carriage," but only in the sense that "the carrier [must] consent to undertake the international transportation of the passenger from one designated spot to another, and that the passenger [must] in turn consent to the undertaking." *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 330-31 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) (footnote omitted). But the characterization of recoverable damages is, by virtue of Article 24, made by the forum court pursuant to the applicable choice of law principles. In the United States, damages for wrongful death are tort damages, and are generally so considered in cases subject to the Warsaw Convention and Montreal Agreement. See, *e.g.*, G. Miller, *supra*, at 241 ("[m]ost [U.S.] decisions appear simply to assume that a wrongful death claim cannot be anything but tortious"); N. Matte, *supra*, at 404; *Sheris* v. *Sheris Co.*, 212 Va. 825, 188 S.E.2d 367, 372, *cert. denied*, 409 U.S. 878 (1972). Indeed, the district court applied the Louisiana prejudgment interest statute applicable to "ex delicto," that is, tort, damages. See La. Rev. Stat. Ann. § 13:4203. In certain other countries, such as France, negligence in carriage is

stipulated. While the Montreal Agreement waives the carrier's "all necessary measures" defense under Article 20(1) of the Warsaw Convention, other defenses are preserved. See Warsaw Convention Art. 21 (contributory negligence of passenger); Art. 24 (plaintiff's lack of capacity to sue). More importantly, the amount of a passenger's damages must be proven. See Pet. Br. 26-27; Amicus Br. at 22 ("The Montreal $75,000 is not a guaranteed recovery"); International Civil Aviation Organization, *Minutes of Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and Hague Protocol, Montreal, Feb. 1966*, at 23 (New Zealand delegate) [hereinafter "Montreal Minutes"]; *id.* at 6-7, 30, 142 (United States delegate); *id.* at 23 (Swedish delegate); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 592 (1967) [hereinafter

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treated as a breach of contract. See G. Miller, *supra*, at 235-40; *Block* v. *Compagnie Nationale Air France*, *supra*, 386 F.2d at 331-32 n.22.

In a related argument, the *amicus* contends that the Montreal Agreement is analogous to an insurance contract, so that court decisions requiring an insurer to pay prejudgment interest in excess of its contractual limit of liability should support the imposition of liability for prejudgment interest over and above the carrier's limit of liability under the Montreal Agreement (Amicus Br. 23-24). This argument is not persuasive. First, the Montreal Agreement "contains none of the basic elements of an insurance contract." *Sheris* v. *Sheris Co.*, *supra*, 188 S.E.2d at 372. Second, the rationale behind the decisions cited by *amicus* is inapplicable to the issue before this Court. Decisions holding insurers liable for prejudgment interest in excess of their liability limits have relied on the public policy underlying applicable state prejudgment interest statutes, concluding that the public policy of the state required the statutorily created obligation for prejudgment interest to be incorporated into private contracts of insurance. *E.g.*, *Denham* v. *Bedford*, 407 Mich. 517, 287 N.W.2d 168, 172 (1980); *Michigan Milk Producers Ass'n* v. *Commercial Union Ins. Co.*, 493 F. Supp. 66, 68 (W.D. Mich. 1980) (applying *Denham*). *Contra*, *Guin* v. *Ha*, 591 P.2d 1281 (Alaska 1979). Local conceptions of public policy cannot override the terms of an international agreement.

"Lowenfeld"]. It is precisely because the $75,000 figure is a limit instead of a guarantee that the required notice to passengers speaks of "proven" damages, and the United States Civil Aeronautics Board and State Department press releases quoted by respondent refer to "provable" damages (Resp. Br. 25-27).[10] Accordingly, there is no basis for Mahfoud's view that the Montreal Agreement's limit of liability fixes a guaranteed amount of liquidated damages due on the date of the accident.[11]

III. THE HISTORY OF THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT ESTABLISHES THAT THE CARRIER'S LIMIT OF LIABILITY MAY NOT BE EXCEEDED TO COMPENSATE A PLAINTIFF FOR DELAY IN SECURING A JUDGMENT AGAINST THE CARRIER.

Respondent argues that prejudgment interest over and above the carrier's limit of liability may be awarded as "reimbursement for delay" because the Montreal Agreement reflects a policy of encouraging the prompt payment of passengers' claims (Resp. Br. 34-38). But the contention that "delay damages" may be awarded independently of the limit of liability established by the Warsaw Con-

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[10] Moreover, the Montreal Agreement was drafted against the background of the United States Congress' refusal to adopt proposed legislation requiring United States carriers to procure aviation accident insurance for the benefit of their international passengers. See Lowenfeld, *supra*, 80 Harv. L. Rev. at 538-46. That proposed legislation would have provided fixed recoveries for death and personal injuries, in addition to any damage recovery against a carrier under the Warsaw Convention. *Id.* at 540-41. The drafters of the Montreal Agreement were thus acutely aware of the distinction between a limit on liability for proven damages and a guaranteed payment of a stipulated amount such as was proposed in the insurance scheme.

[11] The $75,000 limit on liability applies to "wounding" and "other bodily injury" as well as to wrongful death. Accordingly, Mahfoud's argument that this provision fixes the amount of liquidated damages leads to the absurd result that every minor injury to a passenger would be compensated in the amount of $75,000.

vention and the Montreal Agreement is contrary to the historical understanding of the signatories to those agreements.

1. This historical understanding is demonstrated by the "settlement inducement clauses" contained in the Hague Protocol of 1955 and the Guatemala City Protocol of 1971 to the Warsaw Convention.[12] As explained in Eastern's opening brief (Pet. Br. 34-35 & n.30), the Hague Conference, at the instance of the United States delegation, adopted a provision authorizing the separate award of attorneys' fees and costs to plaintiffs, over and above the carrier's limit of liability. The Hague Protocol further provided that the limit could not be exceeded by an award of fees and costs where the amount of the plaintiff's judgment, exclusive of fees and costs, "does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later." Protocol To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371, at Art. XI, *reprinted in* A. Lowenfeld, *Aviation Law* 955, 958-59 (2d ed. Doc. Supp. 1981). The stated purpose of this settlement inducement provision, which was also proposed by the United States, was to create a financial incentive for carriers to offer early settlement payments. International Civil Aviation Organization, *Minutes of International Conference on Private Air Law, The Hague, Sept. 1955,*

[12] Neither the Hague Protocol nor the Guatemala City Protocol have been ratified by the United States Senate, although the United States is a signatory to each of them. But the actions and deliberations of the Hague and Guatemala City conferences may properly be considered as "showing what representatives of the attending countries considered the Warsaw Convention to mean." *Denby* v. *Seaboard World Airlines, Inc.*, 737 F.2d 172, 178 n.8 (2d Cir. 1984).

at 270-71 (United States delegate); *id.* at 272 (French delegate); *id.* at 274 (Australian delegate).

In 1971, an international conference convened at Guatemala City to revise again the limit of liability in light of the Montreal Agreement. The Guatemala City Conference adopted a settlement inducement clause, similar to that contained in the Hague Protocol, authorizing a separate award of attorneys' fees and costs if and only if the claimant has given written notice to the carrier of the amount claimed and the carrier has not made "a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit" within six months of the claimant's notice or, if later, by the commencement of suit. Protocol To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as Amended, *done* at Guatemala City, Mar. 8, 1971, at Art. VIII, *reprinted in* A. Lowenfeld, *Aviation Law* 975, 978-79 (2d ed. Doc. Supp. 1981). The stated purpose of this clause also was to "provide machinery for effective and speedy settlement of claims." International Civil Aviation Organization, *Minutes of International Conference on Air Law, Guatemala City, Feb.-Mar. 1971*, at 15 (New Zealand delegate). See also *id.* at 85 (Norwegian delegate); *id.* at 278 (United States delegate); *id.* at 281 (Belgian delegate).

The settlement inducement clauses of the Hague and Guatemala City Protocols demonstrate the understanding of the delegates that the carrier's limit of liability may not be exceeded to compensate for litigation delays unless the Warsaw Convention is expressly modified to permit that result. The rationale of the settlement inducement clauses—that the Warsaw Convention limit of liability had to be modified in order to provide a monetary incentive for rapid payment of passenger claims—is inconsistent with the notion that prejudgment interest may be awarded over and above the limit of liability as compensation for delay in payment. If such awards of prejudgment interest were

permissible, then there already existed a financial incentive for prompt payment. More fundamentally, the settlement inducement clauses demonstrate the understanding of the signatories to the Warsaw Convention that the limit of liability is unbreakable except in circumstances expressly provided for by international agreement.

2. As shown in our opening brief, the historical understanding that the carrier's limit of liability may not be broken to compensate for litigation delays is further demonstrated by the origins of the terms of the Montreal Agreement. Pet. Br. 41-42. At the Montreal Conference of February 1966, the delegates debated whether the inclusion of legal fees and costs in the $75,000 limit would create an incentive for carriers to prolong litigation, since the limit was "contractual" and could not be exceeded. See Montreal Minutes, *supra*, at 75-76 (French delegate). Moreover, the United States receded from its prior insistence on a $100,000 limit and accepted a $75,000 limit combined with waiver of the carrier's Article 20(1) "all necessary measures" defense. It did so on the theory that a prompt recovery of $75,000 is economically comparable to a recovery of $100,000 after extensive delay, and that the elimination of Article 20(1) would facilitate prompt recoveries. See Pet. Br. 41-43. As explained in our opening brief, this history is irreconcilable with respondent's notion that prejudgment interest may be awarded independently of the limit of liability.[13]

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[13] The underlying purpose of the limit of liability—establishment of an internationally uniform and definite limit on a carrier's potential liability—also argues against an allowance of prejudgment interest over and above the limit. See Pet. Br. 25-26, 28-32. Respondent does not address Eastern's demonstration that the limit of liability would be neither uniform nor definite if prejudgment interest could, depending on local law, be awarded independently of the limit. See also *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 80 L. Ed. 2d 273, 284 (1984) (Convention drafters sought to create "a stable, predictable, and internationally uniform limit" on liability with respect to liability for cargo). Moreover, decisions of English and French courts in cargo cases appear to assume that the Warsaw Convention's liability limits encompass any liability for prejudgment interest. See *Samuel Montagu & Co., Ltd.* v. *Swiss Air Transport Co., Ltd.*, [1965] 2 Lloyd's L. R. 363 (Q.B. Div.); *Compagnie Air France* v. *Nordisk Transport*, 1953 Dalloz, *Jurisprudence* 105 (Cour d'appel de Paris).

3. Respondent claims that "[t]his litigation has been protracted through no fault of Mahfoud." Resp. Br. 38. The *amicus* supporting respondent asserts more generally that a carrier has the unilateral power to delay the entry of judgment, while "the claimant has no corresponding power to demand payment if the carrier elects to delay." Amicus Br. 18. These contentions are inaccurate and ignore the realities of mass disaster litigation. It is not a defendant's obligation to pursue a particular plaintiff's cause of action. That obligation rests with the individual plaintiff and the plaintiff's attorney. A plaintiff has the same power as a defendant to move for summary judgment. Fed. R. Civ. P. 56. Where there is no genuine issue of material fact with respect to either the carrier's liability to the plaintiff under the Warsaw Convention as supplemented by the Montreal Agreement, or with respect to the plaintiff's damages up to $75,000, the plaintiff should be able to secure summary judgment promptly.

In the present case, respondent Mahfoud pursued not only his claim against Eastern, but also a claim against the United States that ultimately resulted in a total recovery of approximately $1.7 million. J.A. 83-85. In this context, respondent did not promptly seek $75,000 per decedent from Eastern in exchange for the dismissal of his claim against Eastern. Rather, respondent waited over three years before he moved for partial summary judgment as to Eastern's liability, even then reserving such matters as whether the $75,000 limit applied and whether the limit was inclusive of prejudgment interest. J.A. 93-94. See Resp. Br. 5 (quoting counsel for Mahfoud

and other movants).[14] This oral motion, made without proper notice on the date Eastern's liability trial commenced, was patently defective, as the Second Circuit held. *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219 (2d Cir. 1980). Respondent thereafter failed to follow the court of appeals' suggestion that he modify and renew his summary judgment motion. *Id.* at 225. During this period, some plaintiffs in this multidistrict litigation were urging the courts to hold that the limit on liability was inapplicable because Eastern had allegedly engaged in "wilful misconduct," a ground that would have been applicable to all international passengers if proven. See *Domangue* v. *Eastern Air Lines, Inc.*, 531 F. Supp. 334, 337 (E.D. La. 1981); Resp. Br. 11 n.6.

In April 1982 Eastern moved for summary judgment limiting its liability to $75,000 per decedent. J.A. 57-66. Mahfoud opposed the motion and claimed, *inter alia*, that the limitation on liability was entirely unenforceable under the Second Circuit's ruling in *Franklin Mint Corp.* v. *Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982), *aff'd on other grounds*, 80 L. Ed. 2d 273 (1984). See Plaintiff's Supplemental Memorandum of Oct. 28, 1982, R. 902-06. On November 16, 1982, the district court ruled that Eastern's liability to Mahfoud was limited by the Montreal Agreement, J.A. 69, whereupon Eastern deposited $75,000 per decedent in the registry of the court. J.A. 81.[15]

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[14] Shortly before respondent orally moved for summary judgment, Eastern made an offer of judgment to respondent in the amount of $75,000 per decedent plus costs. J.A. 34-35. The record suggests that this offer was declined at least in part because it did not provide for prejudgment interest. J.A. 94.

[15] The district court did not address Mahfoud's argument that the limitation of liability was unenforceable in light of the Second Circuit's *Franklin Mint* decision. It is not clear from the record whether the contention ultimately was abandoned by Mahfoud or overlooked or rejected by the district court.

In sum, the record fails to support respondent's assertion that "[t]his litigation has been protracted through no fault of Mahfoud." Resp. Br. 38.

CONCLUSION

For the foregoing reasons and those stated in Eastern's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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